

Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

HEADWATER RESEARCH, LLC,)	
Plaintiff,)	
VS.)	CIVIL ACTION
VERIZON COMMUNICATIONS,)	NO.2:23-CV-352-JRG-RSP
INC., et al.,)	
Defendant.)	
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HEADWATER RESEARCH, LLC,)	
Plaintiff,)	
VS.)	CIVIL ACTION
T-MOBILE US, INC., et al.,)	NO.2:23-CV-379-JRG-RSP
Defendant.)	

REPORTER'S RECORD
TRANSCRIPT OF FINAL PRETRIAL CONFERENCE
BEFORE THE HONORABLE ROY S. PAYNE
June 5, 2025; 9:03 a.m.
MARSHALL, TEXAS

Proceedings recorded in realtime via machine shorthand.

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1 ***** PROCEEDINGS *****

2 THE COURT: For the record, we are here for the
3 completion of the pretrial conference in *Headwater*
4 *Research versus Verizon Communications*, which is
09:03AM 5 2:23-352 on our docket, as well as taking up, and
6 hopefully completing, the pretrial conference for
7 *Headwater Research versus T-Mobile US*, which is our
8 2:23-379 case.

9 Would counsel state their appearances for the
09:03AM 10 record.

11 MS. FAIR: Good morning, Your Honor. Andrea
12 Fair on behalf of Headwater. I'm joined today by
13 Mr. Kristopher Davis, Mr. Adam Hoffman, and we are ready
14 to proceed.

09:03AM 15 THE COURT: All right. Thank you, Ms. Fair.

16 MR. GORHAM: Good morning, Your Honor. Tom
17 Gorham on behalf of T-Mobile Defendants. I'm joined
18 this morning by Dr. Deron Dacus, representing Verizon.
19 Representing Verizon and T-Mobile are a number of Gibson
09:04AM 20 Dunn lawyers. We have Ms. Kate Dominguez, Mr. Robb
21 Vincent, Mr. Josh Krevitt, Mr. Charlie Sim and Andrew
22 Robb, and Ms. Hannah Bedard.

23 Defendants are ready, Your Honor.

24 THE COURT: All right. Thank you, Mr. Gorham.

09:04AM 25 We left off last week with the exhibit issues,

1 so I want to take up the exhibits; and I understand the
2 way counsel have prepared them, we can take up the
3 exhibits for both cases at the same time, and that's
4 fine.

09:04AM

5 I then want to take up any other issues that
6 may have been careted or are otherwise unresolved
7 regarding the Verizon case and then take up T-Mobile and
8 go back to any issues from the pretrial order that are
9 different with respect to T-Mobile, then take up the
10 MILs, to the extent they are different with respect to
11 T-Mobile, and hopefully end the day with both cases
12 being ready for trial.

09:05AM

13 And I will say that it's my understanding that
14 there are discussions going on in the *Empire* case which
15 is, as I understand it, the only case ahead of
16 Headwater/Verizon. So I think there's a very real
17 chance that that case, that the Verizon matter will be
18 first up on the 23rd, in two weeks.

09:05AM

19 So having said that, I would like to hear from
20 either side if there are additional issues that you want
21 to make sure are on the agenda for today. It would be
22 helpful to know about them in advance.

09:06AM

23 Mr. Davis?

24 MR. DAVIS: Thank you, Your Honor.

09:06AM

25 So I think as we mentioned at the last pretrial

1 conference, the issue of indemnification we wanted to
2 talk about at some point during the conference as well.

3 THE COURT: And that is in this case affecting
4 Apple; is that right?

09:06AM

5 MR. DAVIS: That affects at least Apple and
6 Google, who have been identified with witnesses in the
7 Verizon and T-Mobile witness lists as potential
8 may-call-live witnesses.

09:06AM

9 THE COURT: All right. I will make sure that
10 that is on the agenda for later today.

11 MR. DAVIS: All right. Thank Your Honor.

09:07AM

12 MR. KREVITT: Good morning, Your Honor. The
13 only thing I would add is we've received, Your Honor, is
14 rulings of this morning and are digesting them. At
15 least one of the rulings, the summary judgment with
16 respect to the '042 patent implicates in our view, or
17 likely implicates in our view one of the motion in
18 limine rulings Your Honor had, and we'd like an
19 opportunity to think about that, not stand at the podium
20 half-baked and give you my preliminary thoughts on that,
21 but we'd like an opportunity to address that at some
22 point, hopefully soon this morning.

09:07AM

23 And then in addition, Your Honor, as you'll
24 recall from when we were last together, if we have an
25 opportunity, we thought it might be helpful for Your

09:07AM

1 Honor to hear brief argument with respect to the claim
2 construction issues. One of those patents was the '042
3 patent. That, of course, has been resolved. The other
4 is the '541 patent that has a claim construction issue
09:08AM 5 baked in explicitly so by the Plaintiffs and our related
6 Daubert motion.

7 So if we have time, I just wanted to remind the
8 Court that we had discussed and think it may be helpful
9 to address those briefly.

09:08AM 10 THE COURT: And I do intend to go back through
11 the MILs, to the extent that T-Mobile has a different
12 take on any of them. The issue that you're mentioning
13 about the '042 I assume relates to the copying question?

14 MR. KREVITT: Actually, no, Your Honor. So
09:08AM 15 maybe let me just identify for the Court. You'll recall
16 that MIL 4 was a motion in limine that Verizon filed
17 with respect to a Mr. Russell. He had filed a
18 whistleblower. We had extensive discussion.

19 Your Honor had extensive discussion with
09:09AM 20 Mr. Rosenthal on our side and Mr. Chang for Headwater
21 about whether the Cooklev report actually tied what was
22 in those documents to the '042 patent or not. Mr. Chang
23 referred you to paragraph 90 and walked you through
24 several paragraphs in the Cooklev report.

09:09AM 25 Ultimately Your Honor concluded -- I think your

1 words were that you were persuaded that Mr. Cooklev --
2 or I'm sorry; it may be Dr. Cooklev; I'm not sure -- had
3 connected those allegations, those paragraphs to the
4 '042 patent and, therefore, denied our motion in limine.

09:09AM

5 There is no more '042 patent in light of Your
6 Honor's rulings; there is no more Dr. Cooklev in light
7 of Your Honor's rulings. He is here only to talk
8 about -- or would have been here only to talk about the
9 '042 and, as a consequence, there is no basis for any of
10 those documents to come in, given that they are relevant
11 only to the '042 patent. That's the ruling.

09:09AM

12 We are digesting Your Honor's ruling in light
13 of the other MIL, including the copying, but the one
14 that I am certain that we believe requires revision is
15 Motion in Limine Number 4, which was tied explicitly and
16 entirely to the '042 patent.

09:10AM

17 THE COURT: And I feel the need to say for the
18 record that I recognize that the recommendation on the
19 '042 is not -- has not been adopted and may or may not
20 be adopted, but I will also say that I am proceeding on
21 the assumption that it will be with the understanding
22 that if it's not --

09:10AM

23 MR. KREVITT: Yes, Your Honor.

24 THE COURT: -- we will revisit the issue. I
25 just say that because I don't want the record to reflect

09:10AM

1 that I am assuming the outcome.

2 MR. KREVITT: I should have said that as well,
3 Your Honor.

4 THE COURT: No.

09:11AM 5 MR. KREVITT: Apologies.

6 THE COURT: I'm more best to say that, not you.
7 In any event, all right. I will note that that's
8 something that, at the end of the day, we'll address.

9 MR. KREVITT: Thank you, Your Honor.

09:11AM 10 THE COURT: Thank you, Mr. Krevitt.

11 All right. With respect to the exhibits, I
12 would like to take up first the Defendants' objections
13 to the Plaintiff's exhibits. And we have had emailed to
14 us, either yesterday or this morning, an updated bucket
09:11AM 15 list on those, and I'll see that those bucket lists are
16 exhibits to the minutes so that it will be
17 understandable in the record what we're talking about
18 when we refer to it, but the first of those relates to
19 marking and that's bucket 1 of group 1.

09:12AM 20 So if the Plaintiff wants to tell me about
21 those and then I'll hear from the Defendant as well.

22 MR. HOFFMAN: If we can have the...

23 Your Honor, we have some slides that we
24 prepared. May I approach?

09:13AM 25 THE COURT: Yes.

1 And, Mr. Hoffman, let me just say that I don't
2 know the level at which you were able to confer with the
3 other side about these things. If you think it would be
4 more efficient for me to hear what their objections are
09:13AM 5 before you tell me about the exhibits, I'm open to go
6 either way.

7 MR. HOFFMAN: I think, Your Honor, since we
8 already are set up here, maybe at least for this one, it
9 makes sense for me to proceed.

09:14AM 10 THE COURT: All right.

11 MR. HOFFMAN: It might make sense to do it the
12 other way for some of the other buckets.

13 So, Your Honor, what's at issue here is the
14 marking page Your Honor's heard quite a bit about, the
09:14AM 15 ItsOn marking page in last week's hearing and ruling on
16 the summary judgment on marking. So obviously these
17 mark -- in terms of relevance, there's a high degree of
18 relevance for these marking page, not only for marking
19 but also for notice as it relates to willfulness and
09:14AM 20 also for validity.

21 So the degree that the objection is really
22 about hearsay because it's an ItsOn document, at least
23 for willfulness, the documents are not being offered for
24 the matter -- for the truth of the matter asserted.
09:14AM 25 They are being offered to show these are documents that

1 were produced from Headwater's records and they're kept
2 in the normal course of business.

3 Your Honor, I put on the screen a deposition
4 from Krista Jacobsen, which was -- who was the internal
09:15AM 5 counsel at Headwater, and I can -- if Your Honor would
6 like a copy of that, I can also give you a copy.

7 Ms. Jacobsen testified that Headwater worked
8 with ItsOn to figure out which patents should be on the
9 marking page, which patents the ItsOn products
09:15AM 10 practiced. They collaborated with them on the contents
11 of the marking page and, of course, ItsOn was closely
12 related, at least early on, with Headwater and its
13 primary licensee and also its main pathway to
14 commercializing its patents. So it's natural that
09:15AM 15 Headwater would maintain records of the ItsOn marking
16 page.

17 THE COURT: Are you contending that these
18 marking pages would be admissible whether or not the
19 Defendants are going forward with a defense of failure
09:16AM 20 to mark?

21 MR. HOFFMAN: Yes, Your Honor. It's part of
22 the argument for how Defendants were given or made aware
23 of the patents by Headwater and ItsOn in terms of
24 willfulness, and it's also relied on by our expert in
09:16AM 25 terms of validity as well, in terms of commercial

1 success and practice.

2 I'd also point out, Your Honor, that both
3 damages experts as well -- oh, sorry. Actually that's
4 for the next one.

09:16AM

5 Yeah, so we don't believe it is hearsay and it
6 is relevant to issues besides marking, Your Honor.

7 THE COURT: All right.

09:17AM

8 MR. VINCENT: Your Honor, Robert Vincent for
9 Defendants. On these marking pages, Defendants
10 recognize Your Honor's order of this morning on the
11 summary judgment of Defendants, at least Verizon's
12 marking summary judgment; and although it has not been
13 admitted in T-Mobile, I imagine that a similar order is
14 going to be issuing soon on a similar motion in the
15 T-Mobile case.

09:17AM

16 Notwithstanding that fact, these marking pages
17 remain hearsay for all of the reasons that counsel just
18 explained as to why they might be relevant.

19 THE COURT: How long --

09:17AM

20 MR. VINCENT: They cannot be evidence as to
21 practice of the patents.

22 THE COURT: How are they hearsay as to notice?

09:18AM

23 MR. VINCENT: Well, for Verizon there's no
24 evidence at all that I'm aware of -- counsel can correct
25 me. For Verizon, there's no evidence that Verizon ever

1 knew about the Web page. There's zero evidence that
2 ItsOn or Headwater or anyone conveyed the existence of
3 the marking page to Verizon, to any Verizon employee.
4 There -- it cannot be evidence of notice to Verizon when
5 there's simply no evidence that any Verizon employee
6 ever knew about it.

7 For T-Mobile, there is evidence that ItsOn
8 conveyed the existence of the website to Sprint
9 employees. There's no evidence that any Sprint
10 employees visited that website. But nevertheless, for
11 Sprint, T-Mobile, it cannot be -- it is hearsay for the
12 concept that any ItsOn product practiced those patents.

13 Your Honor heard extensive discussion last week
14 about this issue, and all -- at most, what the Headwater
15 and ItsOn employees testified was that the process was
16 that they, at least one claim of those patents, at least
17 one claim was practiced. They put it -- of some product
18 was put on the website, not the asserted claims. And
19 they're not even -- and it wasn't -- didn't mention the
20 '613 patent. Only the '541 patent was listed on the
21 website. So it's definitely hearsay for trying to
22 establish that the products practiced the patent.

23 Again, Your Honor, not to revisit the arguments
24 last week, they have a burden to show that -- to link,
25 to show a nexus to link, to establish that these

1 products practice the asserted claims here, and they
2 have no evidence, no witness testimony, no competent
3 testimony to establish that fact.

4 They cannot -- certainly can't do so because a
09:20AM 5 patent appears on a website. That is insufficient
6 itself substantively. It's also, under the rules of
7 evidence, hearsay for that purpose, to the extent they
8 are going to try to somehow get that inference before
9 the jury, that the existence of a patent on a website, a
09:20AM 10 patent number on a website somehow means that these
11 asserted claims were practiced. It's insufficient
12 substantively, but for these purposes, it's hearsay for
13 that purpose.

14 So I think, Your Honor, that's -- all of these
09:20AM 15 issues, I think Your Honor mentioned notice; I've
16 addressed that. Practice, practice of the patents.

17 It is -- these documents are hearsay for those
18 purposes. So to the extent -- in the Verizon case,
19 again, the Verizon case, there's no basis at all for
09:21AM 20 these to come in for issues for purposes of notice
21 because there's no evidence that Verizon ever saw it.
22 For T-Mobile/Sprint, even if they came in because Sprint
23 had knowledge of the website, even though there's no
24 evidence that anyone visited, they can't come in for any
09:21AM 25 purpose to in any way insinuate that the ItsOn products

1 that were sold to Sprint practiced the patents and
2 that's one of the bases on which counsel said that they
3 were relevant and probative. That can't be the case.
4 That's definitely hearsay. That's an out-of-court
09:21AM 5 statement, and what we know about those, the creation of
6 those websites necessarily means they cannot show that
7 these asserted claims were practiced.

8 THE COURT: Well, to the extent it is hearsay,
9 Mr. Vincent, the witnesses could still testify that they
09:21AM 10 believe they marked it through that marking page, even
11 if the marking page is not in evidence. How would that
12 be hearsay?

13 MR. VINCENT: A witness could testify that they
14 had a marking page. A witness could testify -- again,
09:22AM 15 the Defendants are differently situated. But for at
16 least T-Mobile and Sprint, their witnesses could say
17 that a marking page existed and the '541 patent was
18 listed on the page.

19 What they can't say, what they can't imply,
09:22AM 20 what they can't use that evidence for is to argue that
21 that means these -- that means the asserted claims here
22 were practiced.

23 Again, we're talking about practice because
24 counsel raised that as one of the reasons why these
09:22AM 25 documents are relevant and admissible. That cannot be

1 the case.

2 THE COURT: All right. Thank you, Mr. Vincent.

3 MR. VINCENT: Thank Your Honor.

4 MR. HOFFMAN: Your Honor, many of these

09:23AM

5 arguments just made go to Daubert motions and motions

6 for summary judgments that are pending rather than

7 evidentiary issues. The -- counsel didn't really

8 respond to the argument that these are documents kept in

9 the normal course of business.

09:23AM

10 Again, ItsOn and Headwater shared management

11 and ownership of; and, more importantly, Headwater

12 was -- we have testimony that Headwater was directly

13 involved in working with ItsOn to identify the patents,

14 to put them on their page. And ItsOn also was their

09:23AM

15 licensee and primary partner in monetization; therefore,

16 was completely within the normal course of their

17 business to retain records of the marking page, and the

18 pages we're talking about were produced by Headwater

19 from its records.

09:24AM

20 THE COURT: Are these marking pages websites

21 that were maintained by Headwater or ItsOn?

22 MR. HOFFMAN: The websites themselves were

23 maintained by ItsOn. The printouts of the website were

24 kept in Headwater's records and that's what we're

09:24AM

25 looking at here.

1 THE COURT: So you're saying that the exhibits
2 themselves are Headwater documents?

3 MR. HOFFMAN: Yes, Your Honor. They are
4 printouts from the marking page that Headwater
09:24AM 5 maintained in its files.

6 THE COURT: And --

7 MR. HOFFMAN: And Dr. Raleigh can testify to
8 that at trial.

9 THE COURT: Has he testified to that already?

09:24AM 10 MR. HOFFMAN: He hasn't. I don't think he was
11 asked directly about that in his deposition.

12 THE COURT: What is your way to connect these
13 marking pages to Verizon in terms of notice?

14 MR. HOFFMAN: Well, first, it seems like
09:25AM 15 there's a concession that these were provided to
16 T-Mobile, so I just want to note that.

17 And, Your Honor, I don't -- counsel I think
18 correctly pointed out that they are not directly
19 relevant to Verizon for the notice issue, but that's why
09:25AM 20 we would look to the business records exception there
21 and for T-Mobile that it's not being offered for the
22 truth of the matter because it's being offered as
23 evidence of notice.

24 And it's not the only evidence of notice. It
09:25AM 25 is a piece of a number of communications that, together,

1 show notice to T-Mobile.

2 THE COURT: As you know, one of the
3 requirements of 803(6) is that the records are prepared
4 by a person with knowledge. What evidence do you have
09:26AM 5 that the person who prepared these documents had
6 knowledge of whether the patents practiced or the
7 product practiced the patents?

8 MR. HOFFMAN: Well, in terms of the contents of
9 the document, again we have testimony about the
09:26AM 10 consultation between Headwater, its counsel, and ItsOn
11 engineers to making the determination for the contents
12 of the document.

13 In terms of preparing the printout, I don't
14 believe, again, that that's been addressed in
09:26AM 15 deposition, but Dr. Raleigh didn't address that at
16 trial.

17 THE COURT: And what will he say that will
18 indicate that the person responsible for putting the
19 patent on the marking page had knowledge of whether the
09:27AM 20 ItsOn services practiced the patents that were on the
21 page?

22 MR. HOFFMAN: Well, Dr. Raleigh has testified
23 about the way in which the marking page was determined.
24 Again, consultation between Headwater's lawyers and
09:27AM 25 engineers at ItsOn, so people who knew the patents well

1 and people who knew the products well, consulting to put
2 it on there.

3 He's identified who those people are. James
4 Lavine, for example, was usually the engineer on the
09:27AM 5 ItsOn side. Krista Jacobsen was usually involved, if
6 not always on as internal counsel for Headwater. And,
7 again, Ms. Jacobsen also testified about that process
8 and the way in which Headwater collaborated with ItsOn
9 and the ItsOn engineer to determine what goes on the
09:28AM 10 page. And obviously the ItsOn engineers had knowledge
11 of the products, and Headwater had knowledge of ItsOn
12 patents.

13 THE COURT: All right. Thank you, Mr. Hoffman.

14 MR. VINCENT: Just quickly, Your Honor, a
09:28AM 15 couple of responses, just first to make sure the
16 record's clear.

17 We do not concede that the marking pages were
18 ever provided to Sprint or T-Mobile. There is evidence
19 that Sprint employees were aware of the link but no
09:28AM 20 evidence that anyone ever visited that link to see what
21 patents were, if any, were listed on that page.

22 More to the point, Your Honor, Your Honor asked
23 an important question about what evidence there is about
24 how these -- how this marking page was created, and this
09:28AM 25 goes -- this is such a critical point that touches so

1 many issues.

2 We know Ms. Jacobsen testified -- and we cited
3 this testimony in our briefing -- we know that they --
4 all that was done was there was a process in place to
09:29AM 5 determine if they believed at least one claim was
6 practiced. And when confronted with the marking page in
7 her deposition and shown the '541 patent, the only
8 patent that matters here, when shown the '541 patent on
9 that page, she was asked, "Can you tell me whether or
09:29AM 10 not ItsOn practiced that patent," she says, "I can't. I
11 can't for any specific patent. I know there was a
12 process. Whether it was followed, I can't tell you
13 that." That's point one.

14 So whether there was a process says nothing
09:29AM 15 about whether that process was followed for this patent
16 because the person who created -- who testified on this
17 issue said she couldn't tell.

18 And secondly, again, just one claim. What
19 claim? This marking page doesn't list any claims at
09:30AM 20 all, and that is particularly problematic in this case,
21 Your Honor, with the '541 patent. Because logically if
22 you were going to pick a claim, you'd pick the
23 independent claim, Claim 1.

24 That claim no longer exists, Your Honor.
09:30AM 25 Headwater disclaimed that claim, along with several

1 others, in the IPR proceedings, and the legal effect of
2 that means it's treated as if it was never part of the
3 patent.

09:30AM

4 So whether ItsOn practiced Claim 1 of the '541
5 patent is irrelevant. It's not protected by any patent.
6 Whether the accused products practice Claim 1 is
7 irrelevant. They don't have -- Headwater does not have
8 a patent protection on Claim 1.

09:30AM

9 The only way it matters in this case is if
10 there is evidence that ItsOn practiced the Claims 79 and
11 83 of the '541 patent, and there's not any competent
12 evidence that they practiced any claim, Your Honor.
13 There is certainly no evidence that ItsOn practiced
14 Claims 79 and 83. That's all that matters.

09:31AM

15 So, again, these marking pages are only
16 relevant to the extent ItsOn practiced those claims, and
17 there is no evidence of that happening.

09:31AM

18 THE COURT: We've already talked about the fact
19 that the witnesses will be able to talk about what was
20 on the marking page. The question we're dealing with
21 here is whether the marking page is admissible, and I
22 think that there is a reasonable likelihood that
23 Dr. Raleigh can establish the requisites under 803(6)
24 for that.

09:31AM

25 What I'm going to do is to say that Plaintiff's

1 Exhibit PX35, and I guess in the T-Mobile case, it
2 appears to be PX29 and 35?

3 MR. VINCENT: Yes. In the T-Mobile case, there
4 is an email, an email string. I think that there's --
09:32AM 5 just to be clear, I think the top of the email string is
6 an ItsOn internal email. The rest with -- that would be
7 hearsay. The rest of it is emails with Sprint, with
8 Sprint employees.

9 And so that, again, to the extent the marking
09:32AM 10 pages or the existence of the link is relevant, then
11 that email, we would not have that portion of the email
12 that is the discussions with Sprint employees, we agree
13 there wouldn't be a separate reason for excluding that.
14 But the marking pages themselves and that email are all,
09:32AM 15 again, hearsay for the purposes we discussed.

16 THE COURT: All right. Well, PX35 will be
17 allowed to remain on the exhibit list with an asterisk,
18 and I'll make clear when I see the final exhibit list
19 that it's clear to Judge Gilstrap that the order out of
09:33AM 20 this hearing will be that PX35 cannot be used in front
21 of the jury until Dr. Raleigh has laid a foundation
22 under 803(6) that passes muster with Judge Gilstrap.

23 As far as PX29 in the T-Mobile case, it seems
24 from what Mr. Vincent just said that the resolution
09:33AM 25 there should be that the email, to the extent it was

1 just between ItsOn employees, would be redacted, but the
2 portion that was shared with Sprint could be admissible.

3 Does the Plaintiff have an argument against
4 redacting the part that was not sent to Sprint?

09:34AM

5 MR. HOFFMAN: No, Your Honor. That makes
6 sense.

7 THE COURT: All right.

09:34AM

8 MR. VINCENT: And just to add, Your Honor, I
9 note -- I have not had a chance to review all of Your
10 Honor's rulings this morning. I know we have summary
11 judgment motions on issues of notice and things like
12 that.

09:34AM

13 To the extent those rulings affect the
14 relevance of the things we discussed, that might be a
15 reason to revisit, but I understand Your Honor's ruling
16 today.

09:34AM

17 THE COURT: I think, frankly, the hearsay issue
18 is for the circumstance that notice is not still
19 necessary. To the extent that notice is still a
20 relevant part of the case, I think it's a nonhearsay use
21 of the document. So I don't expect that to change it,
22 but if you think it does, you can certainly raise it
23 again.

09:35AM

24 MR. VINCENT: Yes, Your Honor. I understand
25 with that explanation. I agree with that explanation.

1 THE COURT: All right. While you're up there,
2 Mr. Vincent, tell me about your objection to the next
3 bucket, which is entitled willfulness/copying. It's
4 PX26 and 93 and 13, it looks like.

09:35AM

5 MR. VINCENT: Yes, Your Honor. These,
6 according to the list we have from Headwater, appear to
7 be all directed to Verizon. PX26 is an email to a
8 Mr. Diaz at Verizon, supposedly attaching an attachment
9 which is not part of that exhibit.

09:35AM

10 And PX93 -- again, I'm going by the list we
11 were given -- it's a compilation. It's a compilation of
12 several presentations or several slide decks that
13 Headwater purportedly gave to Verizon, patent briefs.
14 They are dated 2009 and 2011.

09:36AM

15 Again, the list we have, there are some
16 duplicates on that list. Obviously I'm assuming those
17 would be removed. But the argument here, and the reason
18 why they should be excluded, is because these go to the
19 investments that Verizon made in Headwater's last ItsOn.
20 And these documents, the 2009 patent brief, for example,
21 that document predates any of the filing dates of the
22 asserted patents. They contain numerous other patent
23 assets.

09:36AM

24 When Verizon's investments began, there were
25 approximately 30-some-odd patent assets, none of which

09:36AM

1 were the applications or the patents at issue here. And
2 by the time Verizon ended those investments, there
3 was -- I believe the marking page has 88 patents listed,
4 numerous patents.

09:37AM

5 These patent briefs that are part of PX93,
6 again, predate the patents, contain many other patents
7 not relevant to the asserted patents. And so, again,
8 can't provide notice and can only confuse the jury into
9 thinking that to lump Headwater's patents, IP together,
10 to think to that, to come to the mistaken conclusion
11 that Verizon was investing, Verizon was knowledgeable
12 and interested in Headwater's last ItsOn because of the
13 asserted patents, asserted claims, and that's clearly
14 not the case.

09:37AM

15 That's why we had the MIL last week about not
16 allowing investments and that type of evidence in. If
17 so, Verizon would be then compelled to bring witnesses
18 to explain why the investments had nothing to do with
19 these patents. So this is, I think, another flavor of
20 that same argument, Your Honor.

09:38AM

21 THE COURT: All right. Thank you, Mr. Vincent.
22 Mr. Davis, tell me the response to the
23 relevance objection.

24 MR. DAVIS: So, Your Honor, on the relevance
25 objection for these exhibits, so we're looking at

09:38AM

1 representative exhibits PTX26 and 93.

2 If I can have the podium, and I have copies of
3 these slides as well, if I may hand those up.

4 And so what we see here, Your Honor, are PTX26

09:38AM

5 and 93, and I wanted to highlight as one example the

6 lower right-hand corner from PTX93. So this is a --

7 what was called an IP portfolio review. You can see

8 it's dated August 24th, 2011. This was provided from

9 Headwater to Verizon, and it provided a number of these

09:39AM

10 types of documents describing Headwater's patents.

11 I wanted to highlight, as an example, Number 16

12 that you see here that refers to background services,

13 noncritical downloads that are happening, applying

14 policies and DAS, device-assisted services. It also

09:39AM

15 says it's related to patent area number 15 above that,

16 which discusses increasing network efficiency and

17 avoiding congestion. That is the subject matter of the

18 '541 and '613 patents.

19 Those claims recite traffic control policies;

09:39AM

20 they recite foreground and/or background determinations

21 and making policy decisions based on that. And so these

22 detailed patent briefs and IP portfolio reviews that

23 Headwater provided to ItsOn are direct -- or, I'm sorry,

24 that Headwater provided to Verizon are directly relevant

09:40AM

25 to the asserted claims.

1 THE COURT: And where did the remaining
2 asserted patents stand in relation to the August 2011
3 date of this?

09:40AM

4 MR. DAVIS: Oh, yes. I see, Your Honor. Those
5 patents were not issued at that time. They claim
6 priority back to provisional applications -- or
7 actually, nonprovisional applications, I believe. The
8 priority date here is May 25th, 2010.

09:40AM

9 And so I take the point, Your Honor, that maybe
10 you are making that we don't see here the Patent
11 Number '541, the Patent Number '613, but we are
12 describing the way these documents were structured,
13 Headwater was describing to Verizon in great detail all
14 these different areas of patents that it had.

09:41AM

15 And so, you know, I think it's certainly fair
16 from our perspective to say that these are supportive of
17 Headwater's willfulness claims and its copying
18 assertions that this is Headwater putting Verizon on
19 notice of its patent portfolio.

09:41AM

20 It's -- the standard for admissibility of
21 evidence of willfulness or copying does not require that
22 the specific patent number be included. They show that
23 Verizon was well aware that Headwater had an extensive
24 patent portfolio, including in specific subject matter
25 areas that are relevant to the claims here. It

09:41AM

1 demonstrates a willful blindness.

2 THE COURT: And this is part of which exhibit
3 that you have on the screen as your Slide 6?

09:42AM

4 MR. DAVIS: Oh, yes, Your Honor. This is from
5 PTX93 in the Verizon case.

6 THE COURT: What about 13 and 26?

09:42AM

7 MR. DAVIS: Oh, yes. So in the top left
8 corner, I have a screenshot of PTX26. This is -- this
9 is an email from someone at ItsOn to folks at Verizon,
10 copying Dr. Raleigh at ItsOn. The subject line is "IP
11 review." This is from July 2011, and here the email is
12 saying -- and I'm sorry. Maybe actually this is -- I'm
13 sorry. This is PTX13, Your Honor.

09:43AM

14 PTX26 is the detailed patent brief. That one
15 is a little bit earlier. That's from October 2009.
16 That has some relevant IP disclosures as well. But the
17 email that I was referring to, PTX13, that's talking
18 about here is a slide deck that discusses our IP.

09:43AM

19 And so, you know, taken together or
20 individually, Your Honor, what this is showing, all this
21 evidence, is that Headwater was consistently providing
22 information to Verizon about its patenting activities,
23 including with sufficient detail that it links to the
24 asserted claims.

09:43AM

25 We're not talking about just a presentation

1 where Headwater says we have 50 patents generically.
2 It's stepping through in detail these are subject matter
3 areas that we have patent applications or issued patents
4 in.

09:44AM

5 THE COURT: And do you have similar documents
6 that cover the area after these asserted patents had
7 been issued?

8 MR. DAVIS: No, Your Honor, I don't believe so.

09:44AM

9 Yes, the exhibits that we have here are from
10 this general time frame of 2009, 2011, before the
11 patents issued.

12 THE COURT: Can you show me something in
13 Exhibit 26 that is relevant to the asserted patents in
14 the way that what you showed about Exhibit 93 was?

09:44AM

15 MR. DAVIS: Yes, Your Honor. Let's see here.
16 Oh, Your Honor, I'm sorry. I think I was confused about
17 how this worked. Okay. I'm sorry.

09:45AM

18 So PTX26 is what you see on the upper left
19 corner. That is the email attaching and describing that
20 there's an IP review that Headwater's providing.

09:45AM

21 PTX93 actually is a compilation exhibit and so
22 that includes both what you see on the right-hand side,
23 the August 2011 IP portfolio review; it also includes
24 what you see in the lower left corner, the detailed
25 patent brief that is another document within PTX93.

1 THE COURT: So 26 is the email. What is 13?

2 MR. DAVIS: 13, I have to check, Your Honor.

3 Give me just a minute here.

4 So 13 is a June 2009 email to Verizon, again

09:46AM

5 talking about IP of Headwater that ItsOn has licensed in

6 general, but again I recognize that that's June 2009.

7 That is before the priority date of the patents and so

8 we don't have as much detail as we do linking the

9 specific claim limitations with foreground and

09:46AM

10 background like we see in that August 2011.

11 THE COURT: So what is the relevance of 13?

12 MR. DAVIS: Well, I think, Your Honor, that

13 you're seeing some pieces of the IP that is going to

14 eventually materialize into the '541 and '613 claims.

09:47AM

15 You don't yet see all of it like the

16 foreground/background aspect, but you see the policies

17 and traffic policies start to be developed at that

18 point.

19 THE COURT: All right. And all of the exhibits

09:47AM

20 in this bucket were clearly provided to Verizon by

21 Headwater?

22 MR. DAVIS: That's right, Your Honor. I don't

23 believe there's any dispute about that aspect of it.

24 THE COURT: Is there any discussion of the

09:48AM

25 investments that have been excluded by MIL?

1 MR. DAVIS: I don't believe so, Your Honor, but
2 if there is a portion of the underlying documents, we'd
3 certainly be happy to redact that.

4 THE COURT: All right. Thank you, Mr. Davis.

09:48AM

5 MR. VINCENT: Respond quickly, Your Honor.

6 I want to make an important response here, and
7 this -- I don't want to overemphasize the point here,
8 but it touches on so many issues.

09:48AM

9 Headwater has claimed that a 2009 patent brief,
10 as Headwater's counsel said, is somehow linked, has
11 elements of the '541 patent, has flavors, has --

09:49AM

12 Dr. Raleigh testified in this case that the conception
13 date, the conception date of the '541 patent is no
14 earlier than May 2010, and he did so -- he had to do
15 so -- because there was a standing issue. Because if he
16 had conceived of it earlier, there was an issue about
17 whether he owned the patents, about whether Qualcomm
18 owned the patents.

09:49AM

19 He testified that the conception date of the
20 '541 patent is no earlier than May 2010. How in the
21 world could a 2009 patent brief then be linked to claims
22 here that had not been conceived of. That cannot make
23 sense, Your Honor. It cannot, and it infects this
24 entire analysis because what Headwater's trying to do --
25 again, this touches on so many issues. They are saying,

09:49AM

1 well, it has this kernel, this nugget of an idea that
2 then evolved. That's not what the law requires.

3 The law requires a nexus to the claims.

4 Headwater does not have a claim on policies and

09:50AM

5 background data. They don't have claims on those. They
6 disclaimed Claim 1. Claim 1 itself is a specific way of
7 blocking background data with policies, but they don't
8 have patent on that.

9 They have a patent on a very specific way of

09:50AM

10 doing -- applying a policy to protect background data
11 using intercepting API messages. There is -- it is
12 logically impossible for a patent brief in 2009 or 2010,
13 it is impossible for that to give notice of these
14 patents when they haven't even been conceived of. It's
15 impossible to give notice of patents where they don't
16 mention the patents, don't mention the applications, and
17 cite concepts like foreground and background that they
18 don't have a patent on.

09:50AM

19 It's not enough just to point, to pluck out

09:50AM

20 some abstract concept of the claims and say that
21 satisfies it. That's not true, and that's an important
22 point that I, again, I don't want to emphasize too much
23 but it touches on so many issues, Your Honor.

24 That's why these are prejudicial, because they

09:51AM

25 are not linked to the claims, and allowing them in will

1 allow the jury to draw the false conclusion that they
2 are.

3 THE COURT: All right. I agree with your
4 statement that those documents are not sufficient to
09:51AM 5 establish what the Plaintiff is contending, but I
6 disagree that they are inadmissible just because they
7 are not sufficient. And the question that I have to
8 decide is are they relevant in the sense that they make
9 the Plaintiff's argument more likely than it would be
09:51AM 10 without them.

11 And I guess a related question is: Is that an
12 unfair inference. And I don't think the jury's going to
13 have any trouble understanding arguments based on date,
14 which I know your side will very forcefully deliver.
09:52AM 15 But I do think that these documents are relevant to show
16 that Verizon and Headwater had the kind of relationship
17 where the claim that Verizon was aware of Headwater's
18 patents is more likely to be true than it would be
19 without these. Certainly it differentiates from the
09:52AM 20 ordinary case where first notice of the patents is the
21 service of a lawsuit.

22 So I will obviously -- you can cross-examine
23 and make your point very forcefully about the date of
24 these things, but I don't think that the jury will be
09:52AM 25 misled when all of the relevant dates are put before

1 them.

2 So I'm going to overrule the objection based on
3 the assumption I'm not hearing disputed that all of
4 these documents were delivered to Verizon and,
09:53AM 5 therefore --

6 MR. VINCENT: Your Honor, may I have just one
7 moment, please?

8 THE COURT: You may.

9 MR. VINCENT: Okay. Your Honor, one,
09:53AM 10 there's -- I understand Your Honor's ruling. One
11 addition to the exhibit here. PX26 -- Mr. Robb just
12 reminded me -- is the email, Your Honor, remember we
13 were here a few months ago about production of a native
14 email that we have still not received? That was the
09:54AM 15 email that supposedly attached -- Your Honor will
16 remember we had a hearing about a motion to compel where
17 they had mixed and matched exhibits, an email and a
18 presentation.

19 We asked for the native, and we have still not
09:54AM 20 received that actual native email showing what
21 attachment was actually made, what was actually attached
22 to that email.

23 So the presentations, I'm not -- I don't know
24 that the -- all of the presentations were not given to
09:54AM 25 Verizon, but this email that they've cited I think as

1 PX26, that was the email that was at issue that we still
2 don't have the native to know what was attached to that
3 email.

09:54AM

4 THE COURT: So you're saying you received that
5 email, but you don't know what attachments to it you
6 received?

09:55AM

7 MR. VINCENT: Yes. Your Honor, we received a
8 version of the email that had no attachments. And not
9 to relitigate that, to revisit that issue, we received a
10 version of that email that did not have attachments.

11 In a deposition, Headwater attempted to have a
12 witness link an exhibit, a presentation, to that email,
13 but that is not how they were kept. As of today, I do
14 not believe we have received.

09:55AM

15 And Your Honor ordered them to produce a native
16 version of that email, and we still have not received a
17 native version of that email to know what attachments
18 were actually included on that native email. And,
19 again, that is, I believe, PX26.

09:55AM

20 THE COURT: All right. Thank you, Mr. Vincent.
21 Mr. Davis, tell me about Exhibit 26.

09:56AM

22 MR. DAVIS: So, Your Honor, my understanding is
23 we've produced to Verizon what we have and explained it
24 to them in correspondence that -- the document I'm
25 looking at, our correspondence with Verizon, and we say:

1 As to this document, it was produced; you should have
2 the metadata native; the metadata shows the file name as
3 X.

09:56AM

4 I'm not sure, beyond that, what the issue is,
5 if there's -- I don't believe there is anything more for
6 us to produce.

09:57AM

7 THE COURT: Well, at this point I'm overruling
8 the objections to 13, 26, and 93; but after we have a
9 break, I will revisit that if Verizon is not successful
10 in conferring and confirming what you have said,
11 Mr. Davis.

12 MR. DAVIS: All right. Thank you, Your Honor.

13 THE COURT: So we can move on to Exhibit 438,
14 which is Group 4.

09:57AM

15 MR. HOFFMAN: Your Honor, this might be a good
16 place for Defendants to explain what their objections
17 are, since we're not really sure.

18 THE COURT: All right.

19 MR. VINCENT: Yes, Your Honor.

09:57AM

20 The exhibits in this bucket are all things that
21 were produced after the close of discovery for which
22 they are hearsay and which we believe they will be used
23 for -- to convey the truth of the matter, or at least
24 attempt interpretation of what those documents say.

09:58AM

25 So, for example, there is data that was

1 produced by Apple that Plaintiff's experts relied on in
2 a supplemental report. We have motion practice on that
3 supplemental report, whether that should be allowed or
4 not.

09:58AM

5 But regardless of whether that report is
6 allowed, there is data for which they have no testimony
7 explaining, authenticating, providing the relevance to
8 these documents and that is the issue, Your Honor, is
9 that these were produced -- these were not just produced
10 late, but there is no testimony explaining the import of
11 these documents in the manner in which Plaintiff's
12 experts are relying on them.

09:58AM

13 THE COURT: So it's nondisclosure and
14 relevance? Is that what you're saying?

09:58AM

15 MR. VINCENT: And hearsay, Your Honor.

16 THE COURT: I don't see hearsay as one of the
17 objections listed on this.

18 MR. HOFFMAN: Your Honor, there may be some
19 confusion in that I think Your Honor is looking at
20 bucket 4, but I believe counsel has addressed bucket 5.

09:58AM

21 MR. VINCENT: I'm sorry. Yes, you're right,
22 Your Honor. So I apologize. John, I jumped ahead.

23 I can keep on this bucket or I can go back to
24 the bucket Your Honor actually asked me to address.

09:59AM

25 THE COURT: Why don't we take up 4 before we

1 take up 5.

2 MR. VINCENT: Okay. I apologize, Your Honor.
3 I apologize.

4 Yes, so the ItsOn MSA. This is listed on --

09:59AM

5 this document is a master service agreement between
6 ItsOn and Sprint and, yet, Headwater is trying to
7 introduce that document in Verizon's case.

8 It is -- whether or not their experts cite it
9 for whatever purpose, it is a hearsay document. It is a
10 document that's irrelevant to Verizon's interactions
11 with Headwater and ItsOn and is prejudicial because to
12 give Your Honor some background about the Sprint/ItsOn
13 interaction -- again, this is for the Verizon case they
14 are trying to introduce this exhibit.

10:00AM

15 The ItsOn interactions with Sprint, Sprint
16 obtained a ItsOn product called roaming reduction
17 because Sprint was a distant third at the time in
18 carriers, and they were paying Verizon whenever one of
19 their customers roamed onto Verizon's network. So they
20 wanted to reduce the amount of roaming that happened and
21 so they reduced the amount of money they pay Verizon.

10:00AM

22 Those figures, those amounts are irrelevant to
23 the Veri- -- to both cases but especially the Verizon
24 case. And the issue here with introducing it in Verizon
25 as an exhibit, introduce it to the jury, it has figures,

10:00AM

1 it has, you know, data regarding Sprint, a third party,
2 and regarding a context, roaming, which again is
3 irrelevant to what -- to the issues here in this case.

4 So whether or not it's relevant to Sprint,
10:01AM 5 which, again, we don't agree that the exhibit is
6 necessary for any purpose, it's definitely irrelevant to
7 any issues in Verizon such that it needs to be admitted
8 into the case.

9 Again, whether or not an expert wants to -- has
10:01AM 10 relied on it, that does not mean it needs to be admitted
11 into the case.

12 THE COURT: All right.

13 MR. HOFFMAN: Your Honor, taking up the
14 relevance issue first, as counsel indicated, both
10:02AM 15 experts, both damages experts for both sides are relying
16 on this agreement as direct inputs into their
17 calculation of damages.

18 Laura Stamm, Verizon's expert, uses the
19 share -- revenue share provisions within the agreement
10:02AM 20 as a direct input into calculating her reasonable
21 royalty. Here is a paragraph where she does that. And
22 similarly, Mr. Bergman relies on it as well. So it's
23 clearly relevant, and Verizon essentially admitted that
24 it's relevant because its own experts, it's promulgated
10:02AM 25 in expert report that says it's relevant.

1 As to hearsay, again, ItsOn is Headwater's only
2 licensee and its primary channel for commercializing its
3 products. This is the agreement under which almost all
4 of ItsOn's royalty payments to Headwaters were made.

10:03AM

5 So this isn't just some random agreement. This
6 is the core agreement that -- by which the Headwater's
7 patents are commercialized, including the
8 patents-in-suit and, therefore, Headwater maintains this
9 agreement within its records because, again, it's the
10 source of its royalty income from ItsOn.

10:03AM

11 THE COURT: All right. Thank you, Mr. Hoffman.

12 MR. HOFFMAN: Thank Your Honor.

13 THE COURT: Mr. Vincent, if both experts use
14 this in their analysis, that is a pretty solid response
15 to the relevance objection. Is there some portion of it
16 that you would contend is unfairly prejudicial?

10:03AM

17 MR. VINCENT: So, yes, Your Honor. That is the
18 issue in that the document as a whole refers to, again,
19 this roaming reduction scenario and has terms of an
20 agreement that, to my understanding, are not relied on
21 by any expert that, again, are relevant to both cases.

10:04AM

22 I mean, we're talking here about Verizon, not
23 T-Mobile. They have this on Verizon's exhibit list.
24 And, again, what counsel just said is that this is about
25 commercialization of Headwater's patents. So to the

10:04AM

1 extent that we can come to an agreement about, at least
2 those portions should not be included.

3 THE COURT: I mean, licenses with third parties
4 come in all the time for the purpose of calculating
10:04AM 5 reasonable royalty, and there are licenses that don't
6 involve the Defendant in any way.

7 MR. VINCENT: That's right, Your Honor, and the
8 predicate to allowing those licenses in is to show a
9 sufficient nexus to the asserted claims in the case.

10:05AM 10 The problem with the evidence here is that they have not
11 made a connection, again, introducing this evidence in
12 the Verizon case.

13 THE COURT: It just has to be comparable
14 technology. There's no nexus to the claims required for
10:05AM 15 a comparable license.

16 MR. VINCENT: I understand, Your Honor. It
17 doesn't require an analysis as would a practicing or
18 other types of inquiries, but there has to be a
19 connection, and the connection has to be such that, you
10:05AM 20 know, there is a relevance to the issue for which it's
21 presented.

22 And, again, from my understanding is that the
23 experts use this for a limited purpose, not for
24 everything in the master services agreement. There are
10:05AM 25 issues; there are provisions in that agreement that no

1 party is viewing as relevant to the case.

2 THE COURT: I understand that, but it's not
3 worth redacting things unless there is some prejudice
4 that can be shown to flow from them. Can you point out
10:06AM 5 anything in PX438 that you can show has an unfair
6 prejudice?

7 MR. VINCENT: Yes, Your Honor. And that has to
8 do with one of our -- T-Mobile's motions in limine and
9 also relates to a Verizon motion in limine that we're
10:06AM 10 going to argue that later today in that, again, Your
11 Honor has ruled, and I think Headwater conceded, that
12 for -- in the Verizon case, payments to Verizon --
13 sorry. Payments by Verizon to Headwater are irrelevant,
14 and Headwater agreed to keep those out because there is
10:06AM 15 not sufficient evidence to link those investments to
16 these patents.

17 The same thing applies in this case. The
18 payments that Sprint made to ItsOn for this roaming
19 reduction product, either they didn't practice at all
10:07AM 20 and that's -- we believe there's no evidence that they
21 did practice at all, or they practiced all 88 patents
22 that were on the marking page, and there's no tie to
23 this, these asserted patents.

24 And so either way there's prejudice, Your
10:07AM 25 Honor. Either there's no evidence that they are tied to

1 these patents, in which case these payments will give
2 the false impression and prejudicial impression that
3 Sprint was paying for these patents -- again, it's
4 prejudicial in the T-Mobile case; it's doubly
5 prejudicial in the Verizon case -- or if they say they
6 do practice, then they practice all of those patents.

7 And, again, whether we practice -- whether
8 we're paying for one or 88 patents, again, for the same
9 reasons that the payments for Verizon's investments were
10 held irrelevant and agreed to be excluded, these
11 payments and the payment terms should also be excluded
12 in both cases.

13 THE COURT: The reason that the Verizon
14 payments were excluded is that they definitely create a
15 risk of unfair prejudice to Verizon and the jury reading
16 more into them than they should. The payments to Sprint
17 don't seem to me to carry that risk.

18 MR. VINCENT: I understand, Your Honor. I
19 think -- and from our perspective, I think the
20 underlying reasoning is the same or similar because
21 either there is no connection or there's a connection to
22 dozens and dozens of patents.

23 In either case, the risk is the jury will draw
24 the connection saying that we're paying all -- they are
25 going to say that Sprint paid millions of dollars for

1 these two patents and that's simply not the case --
2 actually, one patent because there's only one patent
3 that is alleged to be practiced here and that's simply
4 not the case under any conceivable set of facts.

10:09AM

5 THE COURT: I understand that. I don't have
6 any evidence before me that the Plaintiff is saying
7 that; and obviously if they misstate the facts, that
8 will be your job to point out that that's not true. But
9 let me just inquire from them as to the intended use of
10 this MSA.

10:09AM

11 MR. HOFFMAN: Your Honor, the only intended use
12 is as evidence of the reasonable royalty as disclosed by
13 both experts. So they will be bound by Rule 26 and
14 bound to the reports to use it only in that fashion, and
15 we have no intention of using it for any other purpose.

10:09AM

16 THE COURT: So you do not contend that the
17 payments by Sprint under this MSA were tied particularly
18 to the asserted patents?

19 MR. HOFFMAN: Your Honor, I don't actually know
20 the answer to that question. I'm sorry. I -- it
21 involves an analysis that I'm just not aware of having
22 been done. I don't think we contend one way or another,
23 but I'm not sure.

10:10AM

24 THE COURT: Well, you know whether you're going
25 to contend that to the jury?

10:10AM

1 MR. HOFFMAN: Yes, Your Honor, and we -- we
2 don't intend to, I believe -- we don't intend to
3 represent to the jury that the specific -- this
4 agreement specifically covers or relates to the
10:11AM 5 patents-in-suit.

6 I mean, ItsOn is a licensee to all of
7 Headwater's patents. It may well be that certainly some
8 portion of Headwater's patents are implicated within
9 this agreement, but as to whether -- I don't believe
10:11AM 10 either expert specifically makes representation as to
11 whether the agreement practices that, the
12 patents-in-suit.

13 But we would argue that Defendant has conceded
14 the relevance and the comparability, at least for the
10:11AM 15 purpose of profit split, and its own expert finding it
16 relevant in the direct input into her calculation of
17 damages and our expert doing same. It's a third-party
18 agreement with a competitor, Verizon.

19 THE COURT: It's one thing to contend that the
10:11AM 20 technology at issue in the MSA was comparable enough for
21 the damages experts to consider it in connection with
22 reasonable royalty on the asserted patents; it's another
23 thing to say that the asserted patents were what the MSA
24 was about.

10:12AM 25 MR. HOFFMAN: Yes, Your Honor. I don't --

1 again, I don't believe either expert makes that
2 representation, and we have no intention of making any
3 argument outside of their reports.

4 THE COURT: All right. That is probably the
10:12AM 5 most important is that what you are going to represent
6 about this MSA will be what is already disclosed in your
7 expert's report.

8 MR. HOFFMAN: Yes, Your Honor.

9 THE COURT: All right. Well, I'm going to
10:12AM 10 overrule the objection to 438 with that understanding.
11 That takes us -- let me hear from Plaintiff first on
12 this next bucket they have produced because if there's
13 not an adequate response to that, we don't need to get
14 to anything else.

10:13AM 15 MR. DAVIS: Thank Your Honor.

16 So on the late-produced issue, this was
17 produced by Apple in response to a May 2024 subpoena.
18 What happened with this, the representative exhibit
19 that's PTX1115, this is a -- it's a one-page daily
10:13AM 20 traffic data. It's analytics information provided by
21 Apple.

22 So what transpired is Apple provided a couple
23 of depositions to us in response to the subpoena. Those
24 depositions were timely taken, January 9th and 10th in
10:13AM 25 2025. And during the course of that examination,

1 Headwater's attorney asked the witnesses: What
2 analytics information do you have that's relevant to our
3 claims here? Do you have analytics information for the
4 accused feature or data usage generally for cellular
5 versus Wi-Fi?

6 And what the witness testified is that Apple
7 does have a data analytics team, that they have such
8 information. And so the next day after that deposition,
9 we wrote to Apple and said: Please produce this to us.

10 This is responsive to our longstanding requests for this
11 sort of analytics information, and the witness just
12 confirmed that you have a repository or a system for
13 providing this.

14 That same day, another deposition of a Apple
15 witness was taken. That witness also confirmed that
16 Apple has this information. So Headwater corresponded
17 with Apple for a period of a few weeks, where Apple was
18 investigating this. They said: We have some
19 information that you're requesting but not all of it.

20 And ultimately what they produced, after having
21 said prior to the depositions that they didn't have this
22 information -- we had followed up with them but then it
23 was revealed in the depositions that they did have the
24 information -- ultimately Apple said on February 27th:
25 We completed the investigation; here's the information

1 we found; we'll produce it to you.

2 Once they did, we supplemented accordingly,
3 right away; let the other side know.

4 And so that explains the timeliness issue, Your

10:15AM

5 Honor. This is -- the information was responsive to our
6 longstanding requests on a subpoena served long ago.

7 You know, we took the depositions in a timely fashion,
8 and it was only then that we had the definitive proof
9 that Apple had some of this analytics information we'd

10:16AM

10 been requesting.

11 THE COURT: So what is the date that you
12 produced this to the Defendants?

13 MR. DAVIS: We produced this -- and I'm sorry,
14 Your Honor. I don't have the exact date, but it would
15 have been right after we received it. We -- I know the
16 email that we -- I was just looking at the email that
17 was sent to us. It was February 27th saying: This is
18 when you'll receive it; you'll receive it shortly.

10:16AM

19 I believe it was another week or so after that
20 that we ultimately received the production and then
21 right away we provided it to the other side.

10:16AM

22 And I should add, Your Honor, that we were able
23 to provide this to the other side in advance of the
24 expert depositions so that, you know, any questioning
25 could take place on that.

10:16AM

1 THE COURT: So mid-March, when?

2 MR. DAVIS: Yes. That's right. Let me -- let
3 me see if we mention in our briefing exactly when we
4 received this. This is our -- Docket 195 is our motion
10:17AM 5 for leave to supplement the expert reports. It looks
6 like -- so the dates I have here, Your Honor, are
7 that -- oh, yes. Okay.

8 Apple produced the document on March 12th,
9 2025, and then we provided the supplemental expert
10:17AM 10 report of Dr. Wesel on March 15th, and that addressed,
11 you know, very briefly the March 12 Apple production.

12 And so I think the timeline is relatively
13 clear, Your Honor, that we acted quickly once we
14 received the documents, and unfortunately we weren't in
10:18AM 15 a position where we could realistically even move to
16 compel this information from Apple because we had asked
17 for it, and Apple said "We don't have it." And so it
18 was only through the deposition in January that we
19 understood, yes, Apple actually does have at least some
10:18AM 20 of the information we were requesting.

21 THE COURT: And so you say you filed a motion
22 for leave to supplement Wesel's report, or how did that
23 happen?

24 MR. DAVIS: Yes, that's right, Your Honor.

10:18AM 25 So we served the supplemental expert report of

1 Dr. Wesel on March 15th. We also served a supplemental
2 report of Dr. Bazelon -- that's another Headwater
3 expert -- on March 19. Both of those were in advance of
4 those experts' depositions.

10:18AM

5 THE COURT: And was leave granted?

6 MR. DAVIS: Leave was -- the motion's still
7 pending, Your Honor.

8 THE COURT: All right. Thank you, Mr. Davis.

9 MR. DAVIS: Thank you.

10:19AM

10 MR. VINCENT: Your Honor, if we could be
11 permitted. Because these issues implicate the motion
12 for leave and Mr. Robb knows these issues much more than
13 I do, I'd like for Mr. Robb to address the statements by
14 counsel on this issue as it relates to this.

10:19AM

15 THE COURT: Certainly.

16 MR. ROBB: Thank Your Honor.

17 The -- both the timing and the prejudice
18 associated with the production and reliance on that
19 document is fully addressed in our opposition brief to
20 the motion for leave.

10:19AM

21 I don't want to repeat all the arguments there,
22 but to briefly recap, the problem is the Apple document
23 we believe, strong reason to believe, is not
24 representative of all Apple users, given the manner in
25 which it was collected.

10:20AM

1 The consequence if that data is used instead of
2 data that both parties, up until that moment, had agreed
3 was the correct data relating to how much users actually
4 consume in data per month would have the consequence of
5 essentially [REDACTED] damages.

6 Their experts and our experts all know that
7 that evidence is not correct. The Apple evidence is not
8 right. Every document cited, produced in the case,
9 relied on by both experts shows that that evidence is
10 not correct and not representative of all users.

11 Their own experts effectively concede this
12 where they say "If I were to use this Apple data, then
13 this would have the following impact," where it
14 increases by [REDACTED] the data savings, but they don't
15 actually come out and say it because, again, it's
16 contradictory to every piece of evidence in the case.

17 The extreme prejudice to us because of delayed
18 production is because it was produced months after the
19 close of fact discovery. We did not have a chance to
20 take discovery against Apple on the manner in which the
21 data was collected and its lack of representativeness.

22 So we have a strong reason to believe why it's
23 not representative, but we didn't have a chance to test
24 that during discovery. So given the fact that, if
25 credited, it would massively increase damages in a

1 manner that their own experts are not actually standing
2 behind and we didn't have the opportunity to test it
3 during discovery, it's prejudicial to us.

4 And then our brief, which I refer to Your
10:21AM 5 Honor, walks through the full history of the disputes
6 and communications between Apple and Headwater.

7 THE COURT: And tell me. Is that pending on a
8 motion for leave to supplement the report, or is this a
9 Daubert motion directed to the report?

10:21AM 10 MR. ROBB: It's the former, Your Honor. It's a
11 motion for leave to supplement Dr. Wesel's report and
12 Dr. Bazelon's report.

13 THE COURT: All right. Thank you, Mr. Robb.

14 MR. ROBB: Thank Your Honor.

10:21AM 15 MR. DAVIS: Your Honor, if I may just briefly
16 respond.

17 THE COURT: Mr. Davis, is there any reason why
18 this, the admissibility of this Apple production,
19 shouldn't be determined along with the pending motion?

10:22AM 20 MR. DAVIS: No, Your Honor. I agree that the
21 determination on that motion would settle this. The
22 only thing I wanted to clarify, Your Honor, is that --

23 THE COURT: Did you disagree with the argument?

24 MR. DAVIS: Well, something to that effect,
10:22AM 25 Your Honor. I think I wanted to clarify a couple of

1 brief things.

2 Mr. Robb said that -- or suggested that
3 everyone knows the Apple data is correct. I don't know
4 what he's referring to. We certainly have not conceded
10:22AM 5 or suggested that the Apple data is incorrect.

6 What he's referring to when he says that our
7 own experts don't stand behind it, what happened, Your
8 Honor, is our experts' opening reports had already gone
9 in. That's why it's a motion for leave to supplement
10:22AM 10 the expert reports.

11 And so when we received this additional Apple
12 data, what the experts said was, well, if you look at
13 the Apple data, it actually shows an even greater
14 benefit to the inventions. And so the result of that --

10:23AM 15 THE COURT: This is in your briefing, I assume?

16 MR. DAVIS: It is, Your Honor.

17 THE COURT: All right. Well, I'll take it up
18 in that fashion. Thank you, Mr. Davis.

19 MR. DAVIS: All right. Thank you.

10:23AM 20 THE COURT: And we will take the morning recess
21 and come back and move on to the next bucket. Thank
22 you, and take 15 minutes.

23 (Recess from 10:23 a.m. to 10:40 a.m.)

24 THE COURT: And we're ready for the next

10:40AM 25 bucket. Mr. Robb?

1 MR. ROBB: Thank Your Honor. We changed seats.

2 Mr. Sim, can you pull up PX797?

3 Your Honor, bucket 6 we're asking not be

4 admitted due to hearsay. Exhibit 797 is representative

10:41AM

5 of the bucket. This is a document prepared by a third

6 party called Strategy Analytics and, in particular,

7 individual at Strategy Analytics called Paul Brown.

8 That document was then provided to Samsung. Samsung

9 then in this case cross-produced it to the parties in

10:41AM

10 this case.

11 Strategy Analytics and Samsung were working

12 together to do battery testing that was based on user

13 profiles as far as how they -- minutes of the day that

14 they might be on chat, that they might be on the

10:41AM

15 Internet, something like that.

16 On the left-hand column, there's the Wi-Fi

17 connected in the morning -- then Mr. Sim scrolls down --

18 Wi-Fi not connected -- scroll down farther -- Wi-Fi not

19 connected.

10:42AM

20 Dr. Wesel is relying on this document to

21 establish the hours per day that users are connected to

22 Wi-Fi or not connected to Wi-Fi. The number of hours

23 per day a user is connected or not connected to Wi-Fi is

24 a hotly contested issue between the parties. Dr. Wesel

10:42AM

25 has his opinions, and Defendants have put in opinions by

1 Ms. Sarah Butler. There are Daubert motions pending
2 related to both of those individuals.

3 The question here, though, is whether this
4 document is admissible. We would respectfully submit
10:42AM 5 the answer to that is no. This is a hearsay document
6 that's being offered for the truth of the matter
7 asserted in the sense that, quite literally, Dr. Wesel's
8 looking at the left-hand column and seeing that
9 Strategy Analytics, when constructing the test, chose to
10:42AM 10 set the structure of the test as being here are the
11 hours of the day I'm going to have Wi-Fi off; here are
12 the hours of the day I'm going to have Wi-Fi on.

13 Because the document says this is what we're
14 testing, he is inferring from that that that is actually
10:43AM 15 how users use their devices. So he's using it for the
16 truth of the matter asserted. Setting aside the
17 methodological flaws with that, on the question of
18 admissibility, it's a third-party document. It's
19 actually double-third-party document. It is hearsay,
10:43AM 20 it's being offered for the truth of the matter asserted,
21 and it should be excluded for that reason.

22 There is a separate and independent reason why
23 this document should be excluded. Strategy Analytics
24 also goes by UX Connect, and the individual who actually
10:43AM 25 did this testing, Paul Brown, were never disclosed on

1 the initial disclosures by Headwater.

2 About a week or two before the close of fact
3 discovery, they presented us with the deposition that he
4 took in the Samsung case and said: Will you agree that
10:43AM 5 this deposition can be applied in this case?

6 We said no. We were given no notice of that
7 deposition. We had no opportunity to participate. He's
8 never been disclosed in this case. It's not appropriate
9 and too late.

10:43AM 10 And so for those two independent reasons, we
11 think this document should not be an exhibit.

12 THE COURT: And, Mr. Robb, apparently Google
13 and Samsung had some relationship with Strategy
14 Analytics. Did either of the Defendants in this case
10:44AM 15 have such a relationship?

16 MR. ROBB: Certainly none that I'm aware of,
17 Your Honor, and there's no evidence in the record that
18 we've had any relationship with Strategy Analytics.

19 THE COURT: All right. Thank you, Mr. Robb.

10:44AM 20 MR. ROBB: Thank Your Honor.

21 MR. DAVIS: Your Honor, the document you saw
22 from Mr. Robb, PTX797 in the Verizon case, I think as
23 you explained, that's a Strategy Analytics average user
24 profile. That comes from a third party that Samsung and
10:44AM 25 other companies like Google -- I believe Motorola has as

1 well -- hires to perform battery testing.

2 These profiles that Strategy Analytics creates
3 are reliable. They are the OEM partners of the
4 Defendants who use them and use them to verify their
10:45AM 5 marketing claims about battery life.

6 These average user profiles are developed using
7 analytics taken from thousands of users' smartphones.
8 They are clearly business records of Samsung. They are
9 plainly relevant to Dr. Wesel's opinions.

10:45AM 10 You know, it also just bears noting that
11 Samsung endorses, even claims to have participated in
12 the creation of the average user profile. They say, for
13 example, in documents, together with Strategy Analytics,
14 Samsung has developed day-in-the-life usage models, and
10:45AM 15 they do so and they use Strategy Analytics in large part
16 because they have what's called the AppOptix telemetry
17 intelligence platform.

18 What that means, Your Honor, is that
19 Strategy Analytics uses real-world data from devices to
10:46AM 20 develop its profiles. And so, Your Honor, from our
21 perspective, it's plainly admissible. You know, the
22 Defendants can disagree with the conclusions being drawn
23 from it by Dr. Wesel and can challenge him on that. I
24 certainly --

10:46AM 25 THE COURT: Why isn't it hearsay?

1 MR. DAVIS: Why isn't it hearsay, Your Honor?

2 THE COURT: Yes.

3 MR. DAVIS: Well, it's a business record of
4 Samsung, and the --

10:46AM

5 THE COURT: That would perhaps make it an
6 exception, but it is hearsay, it seems to me, unless you
7 have some way you can point out that it's not being
8 offered for the truth of the matter.

10:46AM

9 MR. DAVIS: Well, I think, Your Honor, that
10 it's being -- the way in which Dr. Wesel uses it is
11 simply for two purposes: To look at what is, as a sort
12 of benchmark of what is applications that are downloaded
13 to a user's smartphone and approximately how long in a
14 given day are users connected to cellular data as
15 opposed to Wi-Fi.

10:47AM

16 Dr. Wesel didn't want to make that up on his
17 own. That certainly would have been challenged by
18 Defendants and so we looked to a source. We certainly
19 asked Defendants for any information they have about
20 this. The best we have, Your Honor, is what their OEM
21 partner uses, Samsung, and other OEMs, to make these
22 relatively simple points.

10:47AM

23 THE COURT: Well, you've indicated that you
24 want to rely on the business record exception. What do
25 you have that establishes that this meets the

10:48AM

1 requirements of Rule 803(6)?

2 MR. DAVIS: So, Your Honor, we have -- there is
3 evidence that the Strategy Analytics average user
4 profile is used by Samsung, that it changes over time,
10:48AM 5 that it is -- there's a 2015 version, a 2017, a 2019, a
6 2022 version, that Samsung has used this for a decade of
7 time to validate its battery testing.

8 Samsung's website even refers to the Strategy
9 Analytics, or now it's called UX Connect, as their
10:48AM 10 source of validating their battery claims.

11 THE COURT: That might make it some adopted
12 admission as to Samsung. How does that establish that
13 it meets the requirements of 803(6)?

14 MR. DAVIS: So, Your Honor, I take the point
10:49AM 15 that, you know, Samsung is not the Defendant here. I
16 note this was a admitted exhibit in the Samsung case,
17 but I take the point that, you know, Verizon did not
18 hire Strategy Analytics; T-Mobile did not hire Strategy
19 Analytics.

10:49AM 20 But the fact remains that, you know, these are
21 the OEM partners and, you know, it's also possible, Your
22 Honor, that this can be considered, you know, a type of
23 market report as well. But it's compiled data that's
24 relied on by those in the industry, including
10:49AM 25 Defendants' OEM partners, for providing reliable

1 information about what users' typical behavior is.

2 THE COURT: How is it published to the
3 industry?

10:50AM

4 MR. DAVIS: Well, it's certainly published to
5 those who hire Strategy Analytics, so Strategy Analytics
6 partners. I don't believe the average user profile is,
7 you know, publicly available on a website, for example,
8 but the folks who hire Strategy Analytics use this
9 average user profile and so it's available to the

10:50AM

10 relevant industry participants.

11 THE COURT: For hire?

12 MR. DAVIS: For hire, yes.

13 THE COURT: I don't think that would make it a
14 market report. I'm not hearing anything that would be
15 sufficient to qualify it as an exception to the hearsay
16 rule. And certainly your expert can rely upon it and
17 can even talk about it, but that doesn't mean that it
18 can be admitted as an exhibit.

10:50AM

19 MR. DAVIS: I understand, Your Honor. I just
20 wanted to add that, Your Honor, I think there is not
21 specifically a requirement under the market report
22 exception that it be free for use or not behind a pay
23 wall or something like that.

10:51AM

24 You know, a lot of market reports, persons or
25 companies do need to pay for those reports because

10:51AM

1 someone made a significant amount of effort and
2 investment in compiling the data.

3 THE COURT: But they're published. They may be
4 published and require a subscription, but they're
10:51AM 5 published.

6 MR. DAVIS: Yes, Your Honor. Yeah, I'm not
7 sure -- you know, here it's published in the sense that
8 if you work with Strategy Analytics, you get the average
9 user profile.

10:51AM 10 THE COURT: That's true of your expert's report
11 as well.

12 MR. DAVIS: Yes.

13 THE COURT: It's also not an exception to the
14 hearsay rule.

10:52AM 15 MR. DAVIS: I understand, Your Honor. And
16 hopefully our expert report is not just a compilation of
17 data like the Strategy Analytics average user profile,
18 but I take your point.

19 THE COURT: Well, I'm going to sustain the
10:52AM 20 objection to 797.

21 Are there other documents, other exhibits in
22 this bucket that you believe require a different
23 analysis?

24 MR. DAVIS: Just a moment, Your Honor.

10:53AM 25 So not necessarily, Your Honor. The other

1 exhibits in this bucket are produced by Google and
2 Samsung. You know, certainly we believe the foundation
3 has been laid.

4 If the issue is hearsay, I don't believe
10:53AM 5 there's a different hearsay exception argument that
6 would be made with respect to those. They are
7 analytical information that is provided by Samsung and
8 by Google based on their -- they certainly are
9 maintained as business records.

10:53AM 10 For example, there are Samsung presentations,
11 Your Honor. That would be Exhibit Number 1188. That is
12 a Samsung internal presentation that discusses an
13 analysis that Samsung had performed of what factors are
14 relevant to customers, including battery life.

10:54AM 15 THE COURT: And do you have a custodian from
16 Samsung who establishes the requirements of 803(6)?

17 MR. DAVIS: Certainly we rely on testimony in
18 our expert report. I don't believe there's a plan to
19 produce a deposition designation from the Samsung case
10:54AM 20 for that specifically.

21 I guess the only other thing I would add, Your
22 Honor, is if -- that we would be granted that if we are
23 able to provide a business records declaration from
24 Samsung confirming that these are, in fact, you know,
10:55AM 25 business records of Samsung's, then, you know, that we

1 be able to revisit this.

2 THE COURT: Well, I'm not going to rule on that
3 hypothetical, but certainly feel free to attempt that.

4 MR. DAVIS: All right. Thank you, Your Honor.

10:55AM

5 THE COURT: I will sustain the hearsay
6 objection to Group 6.

7 MR. ROBB: Your Honor, bucket 7 is essentially
8 identical, if Mr. Sim could please pull up 1070.

10:56AM

9 Your Honor, 1070 is an Ericsson Mobility Report
10 from 2013. It is hearsay and that is the basis of our
11 objection.

12 If you scroll down to page 3, Mr. Sim. Next
13 page.

10:56AM

14 And here we see the document, which is an
15 Ericsson document available on the Internet, reports on
16 various statistics about data usage, number of users in
17 the world, those sorts of things. Those numbers are
18 used by Mr. Bergman in his background as he discusses
19 the wireless industry.

10:56AM

20 This document was not put in front of any fact
21 witness in the case. No Ericsson witness, as far as I'm
22 aware, no Ericsson witness was deposed. There is no
23 basis to establish this as a business records exception,
24 and Mr. Bergman relies on it.

10:57AM

25 The fact that it is reporting, for example, the

1 number of mobile subscriptions as we see on this page,
2 the fact that it reports that, he's using it to
3 establish the fact that it reports that, and it is
4 inadmissible for that reason.

10:57AM

5 THE COURT: All right.

6 MR. ROBB: Thank you.

7 THE COURT: Thank you, Mr. Robb.

8 MR. HOFFMAN: One moment, Your Honor, please.

9 Your Honor, the Ericsson Mobility Reports are

10:57AM

10 used by both Dr. Bazelon and Mr. Bergman for the
11 industry information within them. These, in fact, do
12 fall under the market reports exception like, in the
13 case like shown here, *United States v. Olson*, the Gun
14 Trader's Guide, for example, that was used in testimony
15 there. These are quite similar, and there's actually
16 quite a bit of evidence in the record that these are
17 market reports that are used and relied on in the
18 industry.

10:58AM

19 THE COURT: How is this disseminated to the
20 industry?

10:58AM

21 MR. HOFFMAN: Ericsson has a website, and much
22 of this information is available for free on the
23 website. Some of it's available for pay, but it is
24 published on their website and then all the materials
25 here are published data.

10:58AM

1 THE COURT: Does your expert refer to this as
2 some kind of market report or other similar publication?

3 MR. HOFFMAN: I don't know if he uses the word
4 "market report" but, yes, Your Honor, he characterizes
10:59AM 5 it fairly as market report. And I'll point out that
6 there's another case that, *Aerospace Lines*, of a similar
7 finding.

8 But in terms of the record here, so Steven
9 Rice, who is Verizon's VP of network planning, was asked
10:59AM 10 about the Ericsson Mobility Report. He testified that,
11 in fact, people in his department do refer to that
12 report.

13 They do so because Ericsson -- specifically for
14 these Defendants, Ericsson is a major provider of
10:59AM 15 equipment to Verizon and that -- and more than that,
16 Your Honor, Verizon itself, on its website, has a number
17 of documents where it cites to the Ericsson Mobility
18 Report for exactly the kind of data that the experts
19 rely on.

10:59AM 20 So here's one example. I have these articles
21 if you would like, Your Honor, and here's one example
22 where they are citing to statements in the report,
23 another example where they are providing specific
24 figures about exabytes per month in terms of global
11:00AM 25 mobile traffic.

1 Here's another example where Verizon's citing
2 to Ericsson Mobility Report regarding the number of
3 connections in the industry. And so, Your Honor, we
4 would argue that this does fall under the 803(17)
11:00AM 5 exception and is admissible for that reason.

6 THE COURT: Show me the part of Exhibit 1070
7 that you are seeking to rely on.

8 MR. HOFFMAN: That may take me a moment, Your
9 Honor. I don't have that in front of me in terms of
11:01AM 10 the number.

11 THE COURT: Do you have anything that shows the
12 exhibit?

13 MR. HOFFMAN: I'm sorry, Your Honor?

14 THE COURT: Do you have anything that shows the
11:01AM 15 exhibit? I'm just trying to get a feel for what the
16 format of this exhibit is.

17 MR. HOFFMAN: Your Honor, may I approach with
18 the document?

19 THE COURT: Yes.

11:01AM 20 MR. HOFFMAN: This is actually a compilation
21 document. It has three Ericsson reports under
22 Exhibit 1070. This is the first one, but they are all
23 essentially of the same nature.

24 There's also another set of exhibits that
11:01AM 25 are -- Ericsson on its website has what's called the

1 Ericsson Mobility Visualizer, and it is essentially a
2 tool by which users can run queries against all the data
3 in the Ericsson Mobility Reports.

11:01AM

4 On screen now is a representation of what that
5 is. So it's essentially the same data but in a format
6 where it can be queried. But it's a publicly available
7 database of the data from the mobility report.

8 THE COURT: And your expert is using this for
9 some of the usage numbers that are in it?

11:02AM

10 MR. HOFFMAN: Yes, Your Honor. Both
11 Dr. Bazelon -- particularly, Dr. Bazelon relies on the
12 Ericsson Mobility Reports for information about network
13 traffic and connections.

14 THE COURT: All right. Thank you, Mr. Hoffman.

11:02AM

15 MR. HOFFMAN: Thank Your Honor.

16 THE COURT: Mr. Robb, this looks and sounds
17 like it qualifies as a market report under, I think it's
18 17 -- 803(17). Is there something in it that you're
19 concerned is not in the nature of a market report?

11:03AM

20 Certainly the whole document does not need to come in if
21 there's something in it that you're worried would be
22 misunderstood.

23 MR. ROBB: Yes, Your Honor. I can show -- if I
24 could please have this screen shown. For some reason
11:03AM 25 the screen isn't showing properly. With your patience,

1 Your Honor, then I will read in the passage that I meant
2 to refer to.

3 Usage of the spectrum has increased greatly as
4 a result of advancements in wireless technology. An
11:03AM 5 Ericsson Mobility Report from November 2013 stated that
6 the number of mobile subscriptions worldwide had grown 7
7 percent from the prior year, while the number of mobile
8 broadband subscriptions grew even faster, at a rate of
9 40 percent, exceeding 2 billion.

11:04AM 10 There's then a citation to the Ericsson
11 Mobility Report.

12 Further, the amount of data usage per
13 subscription also continued to grow steadily, and around
14 55 percent of all mobile phones sold in Q3 2013 were
11:04AM 15 smartphones, compared to 40 percent in 2012.

16 There is, again, then a citation to the
17 Ericsson Mobility Report.

18 So the -- our point, Your Honor, is that this
19 is -- these are documents produced by Ericsson
11:04AM 20 that their expert is not -- he's not treating it or he's
21 not analyzing whether it's a report that's broadly
22 distributed and simply compiling data.

23 And, in fact, there's no evidence that I'm
24 aware of that indicates how it's a compilation of data,
11:04AM 25 what analyses they did to perform it, anything that

1 would establish it as a market report. Certainly it
2 doesn't meet any of the other quotations lists
3 directly -- sorry, quotations lists or directories.

4 And without -- they took no deposition of an
11:05AM 5 Ericsson witness. Their own experts didn't lay the
6 foundation of how it meets -- how it's compiled,
7 et cetera. We just don't think there's an evidentiary
8 basis for that, Your Honor.

9 THE COURT: All right. I think that's part of
11:05AM 10 the reason that market reports are accepted, because
11 they are generally accepted in the industry, and
12 certainly I think this looks like one of those. The
13 fact that your own client cites to it certainly leans in
14 the same direction.

11:05AM 15 I'll overrule the hearsay objection as to this
16 document, which is Exhibit 1070.

17 Is there anything else in this bucket,
18 Mr. Robb, that you would contend should be analyzed
19 differently?

11:06AM 20 MR. ROBB: No, Your Honor. They rise and fall.

21 THE COURT: All right. Thank you. Then I'll
22 overrule the objection to this bucket.

23 MR. ROBB: Turning to the next bucket, Your
24 Honor, bucket 8 are FCC documents.

11:06AM 25 Mr. Sim, if you could please pull up 1101.

1 Your Honor, this is a print-off from the FCC
2 website reporting on the results of an FCC auction. If
3 Mr. Sim scrolls -- zooms in. There's a gross bids --
4 thank you. There's a gross bids and a net bids line
5 item of 44 and 41 billion dollars.

6 This ties to the large numbers MIL that was the
7 subject of argument last week. The dispute between the
8 parties has nothing to do with the gross bids, the net
9 bids, or even the average price paid at this auction.
10 So no one disputes -- and I think I now can say that
11 without dispute because their expert and our expert used
12 literally the same number -- that the result of the
13 AWS-3 auction was \$2.53 per unit. Think of it as a
14 price per square unit for this auction.

15 The way that number is calculated, of course,
16 has to do with taking the total fees generated from the
17 auction divided by the number of units sold at the
18 auction, but there is no dispute about either of those
19 two numbers.

20 Instead, the dispute between the experts is
21 about which FCC auctions should inform the average price
22 of the company Spectrum Holdings. So Dr. Bazelon relies
23 on this number and the \$2.53, and Dr. -- which is
24 Headwater's expert. Verizon's expert, Dr. Hazlett,
25 relies on this plus other auctions and averages those

1 numbers.

2 Reliance on -- sorry. This document being used
3 to show the overall number is inherently prejudicial
4 because of the large numbers effect that we had raised
5 with Your Honor last week.

11:08AM

6 It is also not necessary to show this because,
7 again, there is no dispute between the parties that the
8 consequence, that the result of the auction 97 is a
9 \$2.53 number. Neither expert is going to dispute that.

11:08AM

10 It's just simply a matter of do you take the average of
11 all the auctions or do you focus on this auction.

12 And so for that reason, this document should
13 not come in because it is unduly prejudicial and it
14 doesn't go to any disputed issue in the case.

11:08AM

15 THE COURT: All right.

16 MR. HOFFMAN: So, Your Honor, I think we talked
17 a fair amount about this at last week's hearing. Your
18 Honor may remember that Dr. Bazelon has a chart in which
19 he shows his calculations of what the price of the --

11:09AM

20 sorry, what the cost of spectrum is on a megahertz per
21 population basis; and you may recall in that chart, he
22 cites directly to the documents that we're talking about
23 as a direct input into how he calculates that.

24 You know, the Federal Circuit has ruled that
25 experts have to tie their opinions to real facts and to

11:10AM

1 real evidence, and what Verizon proposes is that Mr. --
2 or Dr. Bazelon be deprived of the underlying evidence in
3 his opinion, which both hurts, is prejudicial to us as a
4 party but also undermines his ability to explain to the
5 jury where these numbers come from and how they are
6 calculated.

7 And again, Your Honor, we talked about last
8 week the Court's prior ruling of *Finesse*, which was
9 right on this issue in terms of Dr. Bazelon relying on
10 price paid for in auction and that those be admissible,
11 as they were the underlying basis of his calculation.

12 I would also point out that there's some other
13 documents in this category. For example, a couple of
14 them are what counsel showed, which is essentially what
15 he showed in another one for another auction exactly
16 like that.

17 There's a third document in this category,
18 which is a larger report from the FCC. It's a
19 government document on a government website as part of
20 the normal actions of the FCC, and it provides industry
21 data and data specific to both -- well, anyway, it
22 provides industry data that is cited and relied on by
23 Dr. Bazelon.

24 So this is a page from that market report,
25 PX1092, another one and so we think that's -- if the

1 concern here is just the big number as it relates to the
2 auction, we believe that these are a different,
3 different category, Your Honor.

4 THE COURT: All right. Thank you, Mr. Hoffman.

11:12AM

5 I'm going to overrule the objection, which is
6 largely based on Rule 403. This is not the sort of
7 number that I think *Uniloc* and *LaserDynamics* are worried
8 about.

11:12AM

9 The unnecessarily large revenue or profit
10 numbers have the consequence of making the jury thinking
11 that the Defendant can afford whatever this small amount
12 is that the Plaintiffs are seeking. This is not a
13 number that relates to the Defendants' revenues.

11:13AM

14 I think it's reasonable for the Plaintiff's
15 expert to rely upon it, so I'll overrule the objection
16 to Exhibits 1092, 1101, 1103 in the Verizon and 1090,
17 1099, 1101 in T-Mobile.

18 Mr. Robb, what's next?

19 MR. ROBB: Thank Your Honor.

11:13AM

20 Moving to bucket 9, 278 is identified as
21 representative.

22 Mr. Smith, if you could please pull up 278.

23 Your Honor, 278 is an excerpt, or a portion of
24 the errata with exhibits attached to Mr. Bergman's
25 report. It is hearsay, and it is not properly

11:13AM

1 admissible as an exhibit.

2 THE COURT: All right. Sounds like hearsay.
3 What's the response, Mr. Hoffman?

11:14AM

4 MR. HOFFMAN: Your Honor, may I approach and
5 give you an excerpt from 278?

6 THE COURT: You may. And I'll hand you back
7 1070 while you're at it.

8 MR. HOFFMAN: Thank you, Your Honor.

11:14AM

9 THE COURT: Mr. Hoffman, these may be good
10 demonstratives for when your expert is testifying, but
11 how can they not be hearsay?

11:15AM

12 MR. HOFFMAN: Your Honor, our contention is
13 that these are 1006 summaries. The spreadsheets that
14 these are based on are run to tens of thousands, in some
15 cases hundreds of thousands of lines.

11:15AM

16 Those spreadsheets themselves are in evidence,
17 or will be in evidence. Those are agreed without
18 objection. They are on T-Mobile and Verizon's list, the
19 underlying documents, but they are just too voluminous
20 to be of any value or any way for the jury to understand
21 it. And that's what Schedule 3.3 and 3.4 are. These
22 are 1006 summaries.

11:15AM

23 And I'll point out, Your Honor, these are
24 exactly the kind of summaries that Your Honor overruled
25 objections to in both the Samsung 422 and Samsung 103

1 case for exactly this reason.

2 THE COURT: All right. They may be --

3 Schedules 3.3 and 3.4 do not appear to reflect that

4 there's some judgment of the expert that goes into

11:16AM

5 categorizing the numbers. The Schedule 4.1 is a part of

6 me to determine that regard, but let me put Mr. Robb to

7 that task.

8 MR. HOFFMAN: If I could just add quickly, Your

9 Honor. Instead of 4.1, we propose to the other side

11:16AM

10 that we redact essentially everything except the last

11 two lines. Mr. Bergman relies, calculates profit margin

12 from this data, which is from a number of 10-Ks and so

13 voluminous, and we're fine with redacting essentially

14 everything except the outcome of his calculations as the

11:16AM

15 profit margin.

16 THE COURT: And tell me which lines that would

17 leave?

18 MR. HOFFMAN: So that would leave total

19 operating profit margin and then operating margin

11:17AM

20 excluding certain costs, those last two lines at the

21 bottom of Schedule 4.1.

22 THE COURT: All right. I'll hear the response

23 to that.

24 MR. ROBB: Your Honor, I think it's clear from

11:17AM

25 our own expert's report that we don't dispute the total

1 operating profit margin where the operating margin
2 excluding certain costs that Mr. Bergman calculates.
3 We, of course, dispute the way in which he uses it,
4 which is the subject of a dispute between the parties.

11:17AM

5 As far as this document, a redacted version of
6 this document being an exhibit, it's a chart that their
7 expert created. It's a visual aid.

11:18AM

8 THE COURT: Well, if it is, in fact, a 1006
9 summary of your records, the 3.3, Schedule 3.3 and 3.4
10 look to be that. Do you contend that they are anything
11 other than an aggregation of what's in the underlying
12 documents that your clients produced?

13 MR. ROBB: No, Your Honor. The primary dispute
14 is with respect to 4.1.

11:18AM

15 THE COURT: All right. Well, I'll overrule the
16 objection to 3.3 and 3.4.

17 Turning to 4.1, if it is redacted down to those
18 last two lines, if I heard you right, you just said you
19 are in agreement that that information is correct?

11:18AM

20 MR. ROBB: Yes, Your Honor. The issue that
21 we're struggling with is that it does not meet the 1006
22 exception because these are pulled straight from the
23 10-Ks and that's just a straight mathematical operation.

11:19AM

24 There's no more -- I don't believe at least
25 that there's any more numbers that he used to generate

1 these other than the numbers that appear. So it's not a
2 summary of a voluminous record.

3 Not to step on the toes of my colleague who is
4 going to argue next, there's a separate issue with
11:19AM 5 showing the 10-K overall operating figures and those
6 things that actually are steps that result in the
7 operating margin. So we don't think those should be
8 shown.

9 This is an issue where the parties don't
11:19AM 10 dispute the substance; it's just that this itself
11 doesn't meet the qualifications of an exhibit, and the
12 top line numbers are violative of the Court's notes.

13 I would -- in light of Your Honor's ruling on
14 the first two pages, if I can suggest, perhaps at the
11:19AM 15 lunch break, we and counsel can discuss whether to
16 either enter some sort of stipulation as to just these
17 numbers such that the 10-Ks and the rest of the chart
18 are not necessary, redacted version as counsel had
19 proposed or something along those lines.

11:20AM 20 THE COURT: I can tell you that I'm not likely
21 to admit 10-Ks, maybe pages here and there from 10-Ks,
22 but they definitely are what I would call voluminous
23 records.

24 MR. ROBB: Yes, Your Honor. Again, I apologize
11:20AM 25 for stepping on the toes of my colleague's argument,

1 which is coming next. Headwater has already -- we made
2 that point to Headwater; they agreed to limit them. So
3 now it's in the realm of twenty or thirty pages per
4 10-K.

11:20AM

5 We still have a MIL problem with them in the
6 sense that the pages that are included still include the
7 top line revenue numbers, et cetera, that is the subject
8 of the court's standing MIL. The issue we're trying to
9 navigate is, again, we don't dispute the actual profit
10 margin. The big numbers can't be shown because of the
11 standing MIL. This itself doesn't meet the definition
12 of the compilation, so that's the issue that I would
13 request to have an opportunity to negotiate with
14 counsel.

11:20AM

11:21AM

15 THE COURT: Well, I am willing to admit the
16 bottom two lines, and I guess that would also include
17 the very top line that has the fiscal year. Otherwise,
18 the bottom two lines don't have?

19 MR. HOFFMAN: Yes, Your Honor.

11:21AM

20 THE COURT: Okay. Well, then I'll admit 3.3
21 and 3.4 as they are, and I will admit 4.1 with
22 everything redacted between the top line and the bottom
23 two lines. I'm satisfied that those qualify under 1006.

24 MR. ROBB: Yes, Your Honor.

11:21AM

25 And I think Your Honor already said that it's

1 an issue that's near and dear to our heart, so if I
2 could ask for clarification. When you say the top line,
3 you mean the fiscal year line, not the services revenue
4 number line?

11:22AM

5 THE COURT: That is what I mean.

6 MR. ROBB: Thank you, Your Honor.

7 MR. HOFFMAN: Your Honor, if I may, there's a
8 couple of other exhibits in this category that are
9 significantly different from the one we just addressed.

11:22AM

10 THE COURT: All right. Go ahead and address
11 those.

12 For the record, what is the exhibit number that
13 we were just talking about? I don't see it on the
14 document.

11:22AM

15 MR. ROBB: 278, Your Honor.

16 MR. HOFFMAN: And also, I believe the same
17 ruling reasonably applies to T-Mobile's PX89, which has
18 the same, essentially the same schedules.

11:22AM

19 THE COURT: All right. And what is the exhibit
20 you are now wanting to address, Mr. Hoffman?

21 MR. HOFFMAN: Your Honor, the exhibit we want
22 to address is PX1113 in the Verizon case and 1111 in the
23 T-Mobile case, and these are some relatively voluminous
24 spreadsheet.

11:23AM

25 And, Your Honor, if I may approach.

1 So this is the declaration from the records
2 custodian for Ceramic Software, which is also
3 commercially known as Airwave data -- I'm sorry, Airwave
4 Research. Mr. Bazelon relies on the population data
5 from Airwave in his calculations.

11:24AM

6 As you can see in the custodian's declaration,
7 what this is is it's information that's compiled by the
8 FCC that Airwave essentially pulls out of the FCC
9 database and compiles it in the fashion you see here.

11:24AM

10 So the underlying data is government data, and
11 essentially the only way to, I guess, put that database
12 in front of the jury is through Airwave's analysis,
13 which, I don't know that I would say that everybody in
14 the industry uses it, but certainly Dr. Bazelon

11:24AM

15 typically uses it and testifies as to its reliability in
16 terms of the population data. And, again, it's
17 essentially FCC data reorganized.

18 THE COURT: Well, I assume you are offering
19 Mr. Weinberger's declaration in support of the business
20 records exception?

11:25AM

21 MR. HOFFMAN: Yes, Your Honor.

22 THE COURT: All right.

23 MR. HOFFMAN: And I would argue that also the
24 exception applying, so it's government records, at least
25 arguably applies to this because, again, it's the

11:25AM

1 presentation of FCC data.

2 And then, Your Honor, there is one more, which
3 I don't have here for some reason. So there's one other
4 exhibit, which is exhibit in the Verizon case, PX277.

11:25AM

5 That's essentially a chart from Mr. Bazelon's report
6 that summarizes or collates the data, which again is
7 voluminous, from Airwave into a single -- into a single
8 schedule.

9 THE COURT: All right.

11:26AM

10 MR. HOFFMAN: Thank Your Honor.

11 MR. ROBB: In light of Your Honor's ruling with
12 respect to compilations, we will acknowledge that the
13 same ruling applies to 277, which is a chart prepared by
14 Dr. Bazelon relying on the Airwave materials.

11:26AM

15 With respect to the Airwave materials
16 themselves, though, there are a few issues. So first is
17 disclosure. Airwave Research was never disclosed in the
18 initial disclosures. We have never heard of
19 Mr. Weinberger before.

11:26AM

20 This declaration was, on its face, executed on
21 May 2, 2025. We did not receive a copy of it until
22 May 29, 2025. It was, I believe, the day before the
23 pretrial conference from last week. We've had no
24 opportunity to seek discovery on any of these issues, so
11:27AM 25 it's untimely in that regard, and the conclusory

1 language in paragraph 3 we don't think is sufficient in
2 light of the lack of discovery on that.

3 THE COURT: The business records declarations I
4 don't think have to be disclosed during the discovery
11:27AM 5 period as long as the records that the declaration is
6 addressing were timely disclosed. Were these underlying
7 records which are Exhibits 1111 and 1113, were those
8 timely disclosed?

9 MR. ROBB: First time they were disclosed, Your
11:27AM 10 Honor, was in Dr. Bazelon's report. So they were never
11 produced during fact discovery, and the company was
12 never disclosed during fact discovery, and Headwater
13 never disclosed that they were going to rely on this
14 theory of damages during fact discovery.

11:28AM 15 THE COURT: All right. And then so when --
16 Dr. Bazelon's opening report, when was that served?

17 MR. ROBB: I believe it was January 29th, Your
18 Honor.

19 THE COURT: The discovery cutoff, as I recall,
11:28AM 20 was February 7?

21 MR. ROBB: Yes, Your Honor. There was a quirk
22 in the schedule. It was originally set for before then.
23 I believe it was, like, the parties had agreed on a
24 close of fact discovery, or the date was set in late
11:28AM 25 January. We asked for it to be moved to February 7th.

1 That ruling had not yet been decided. The parties then
2 served their opening reports, then discovery was pushed
3 about a week after that.

11:29AM

4 And so due to that essentially lag period, his
5 initial report was served approximately eight days
6 before the close of the final discovery, fact discovery
7 cutoff.

11:29AM

8 THE COURT: And so tell me about the prejudice
9 to you from that. What would you have done about
10 whatever is disclosed in these two exhibits?

11 MR. ROBB: Our expert would have liked to have
12 more time to determine whether he agreed with the
13 analysis that Dr. Bazelon performed on these.

11:29AM

14 Our expert, given the limited time of
15 discovery, put in criticisms of the FCC auctions and of
16 some of the theories and models presented by
17 Dr. Bazelon. He offered no criticisms of the Airwave
18 analyses that Dr. Bazelon had put in simply because he
19 didn't have time to perform those analyses.

11:30AM

20 THE COURT: All right. Mr. Robb, under the
21 circumstances, I think that the disclosure was
22 sufficiently timely, given the nature of the evidence
23 and the fact that I don't think the Plaintiffs had it
24 before their expert provided it to them.

11:30AM

25 So I don't think it was withheld, and anyway, I

1 will overrule the objections to 1111 and 1113.

2 MR. ROBB: Thank Your Honor.

3 With your permission, I'd like to just check
4 one thing. It will take ten seconds.

11:30AM

5 THE COURT: Certainly.

6 MR. HOFFMAN: And, Your Honor, I believe
7 counsel conceded that PX277 is a 1006 summary, and we
8 would ask that the objection to that be overruled as
9 well.

11:31AM

10 THE COURT: It is.

11 And perhaps, Mr. Robb, if I can interrupt you
12 and ask the Plaintiff to identify for me in the next
13 bucket what portions of these 10-Ks are they seeking to
14 admit?

11:31AM

15 MR. HOFFMAN: Your Honor, may I approach?

16 THE COURT: Yes.

17 MR. HOFFMAN: Your Honor, what I've handed you
18 is -- I think counsel mentioned that we had put together
19 a excerpted version of the 10-Ks to try to cut down, I
20 guess, the issues. Even within these, you know, we're
21 certainly willing to cut them down to just that
22 information which is directly relied upon by the
23 experts.

11:32AM

24 I should say that both of the -- well,

11:32AM

25 Dr. Bazelon and Mr. Bergman rely on these, and some of

1 the issues are connected to Daubert issues as well. But
2 there are essentially, within this document, there are
3 three categories of information that we ask be admitted.

4 It doesn't seem like the HDMI is connected.

11:32AM

5 But, Your Honor, if you could please look --
6 there it goes. Sorry.

7 So within the data that you have here, if you
8 look at the screen or you look at PTX265, this is a
9 picture from essentially the third page of the document,
10 and this shows the information from -- so there's a
11 chart here that admittedly includes dollar numbers.
12 We're not using those and we're fine redacting them.

11:33AM

13 What the experts rely on is the connection data
14 shown on the screen. We would find where the only issue
15 in the chart is connection data, redacting dollar
16 figures from that.

11:33AM

17 The second category is statements by Verizon in
18 their 10-Ks that the experts rely on as provided a
19 couple -- there's a number of them, so I provided just a
20 couple examples of how they are being used.

11:33AM

21 So this is Mr. Bergman's report where he's
22 citing to the 10-K regarding statements by Verizon as to
23 the importance of speed and coverage and other issues
24 going to the importance of capacity to Verizon and to
25 its competitive stature.

11:34AM

1 And then the third one, and admittedly I think
2 this is the controversial one, but counsel can correct
3 me if I'm wrong. And this is detailed to more detail in
4 the Daubert motions both against Dr. Bazelon and
5 Mr. Bergman and go to their MIL 5, and which Your Honor
6 I think ruled this morning you would hold until you
7 ruled on the Daubert motions.

8 I think this particular issue with the 10-Ks,
9 this third category of data probably rises and falls on
10 that. But as described in the briefing, it's
11 Defendants' position that they don't actually need
12 excess capacity and that they have enough capacity and,
13 therefore, the invention provided capacity savings has
14 no value to them.

15 Both Mr. Bergman and Dr. Bazelon point to their
16 continued investment in capacity as evidence that they
17 are not satisfied and that they are continuing to invest
18 because if they don't continue to invest at high levels,
19 they will quickly run out of excess capacity because
20 traffic is ever growing. So this is a cite from
21 Mr. Bergman's report relying on that data from the
22 10-Ks. It's essentially one line.

23 If you look, Your Honor -- well, anyway, I'm
24 sorry, Your Honor. I don't have the direct cite.

25 So, again, there are three categories that we

1 would ask be found admissible, and we would work with
2 Verizon and T-Mobile to make sure we're on agreement
3 about which those are.

4 Again, it's within the 10-Ks, disclosed data by
11:36AM 5 the Defendants about connections and subscribers, pretty
6 much what you see on screen here, but also there's one
7 for different periods, statements about the importance
8 of capacity and narrative statements within the 10-Ks,
9 and third, information about the continued capital

11:36AM 10 investment in capacity by the Defendants, which is
11 really an issue that they themselves have created by
12 countering our case by arguing that they have all the
13 capacity they need and so our invention has no value.

14 Thank Your Honor.

11:36AM 15 THE COURT: All right. Thank you, Mr. Hoffman.

16 MS. BEDARD: Good morning, Your Honor. Hannah
17 Bedard on behalf of the Defendants.

18 THE COURT: Good morning.

19 MS. BEDARD: So I will quickly address the

11:37AM 20 10-Ks which are in bucket 10, and again, these are
21 Verizon Plaintiff's Exhibit 265 and T-Mobile Plaintiff's
22 Exhibit 75. So these are both compilations of the SEC
23 filings. We looked at, it sounds like from the

24 Plaintiff's side that there's three categories that they
11:37AM 25 want to keep in this case and that they are okay with

1 redacting the many large numbers.

2 I'll note that the Verizon exhibit has been
3 excerpted down to 32 pages. Almost all of those pages
4 do have the large numbers on them. So, for example,
11:38AM 5 they have Verizon's total operating revenues, total
6 expenses and so for that, we think that that runs afoul
7 of this Court's standing MIL 3 and also runs into the
8 same issues that the Court identified discussed in
9 bucket 8 in terms of the prejudice that that could cause
11:38AM 10 to the Defendants.

11 THE COURT: It definitely does. And so there
12 are obviously significant further redactions required.
13 The narrative statements that were the first two
14 categories, I think, that the Plaintiff is arguing for,
11:38AM 15 they don't appear problematic from the large figure
16 standpoint. Do you have other objection to them?

17 MS. BEDARD: We don't have other objections
18 to -- for the first two categories, the connection data
19 and the narrative, the narrative statements. For those
11:39AM 20 we can discuss with the Plaintiff side whether we should
21 just entirely redact from the 10-K or if we should
22 perhaps excerpt from the 10-K and cite that the, you
23 know, source of that information is the Defendants'
24 10-K, and we're happy to discuss with the Plaintiff or
11:39AM 25 take Your Honor's direction on what would be the most

1 efficient way to present that information.

2 THE COURT: If they want the cover sheet, in
3 effect, or parts of the cover sheet that show it's an
4 official filing, I would allow them that, and they can
11:39AM 5 redact down to the information in the first two
6 categories.

7 As far as the third category, I do expect that
8 that will be decided in connection with the Daubert
9 issue, and --

11:40AM 10 MS. BEDARD: Understood, Your Honor. We would
11 just point out that there is a disconnect in the
12 Plaintiff's argument here in terms of their willingness
13 to redact the big numbers but their intent to get in the
14 big numbers by proxy of how much billions of dollars
11:40AM 15 have been spent on spectrum.

16 And so we understand the distinction that Your
17 Honor may make in terms of a decision that is pending on
18 the MIL 5, but we do think that they are using these
19 numbers, the big, big numbers regarding spectrum in
11:40AM 20 order to point out the amount of money that the
21 Defendants may be able to pay, and it runs into the same
22 issue of making the jury believe that the Defendants
23 will be able to afford to pay whatever amount the
24 Plaintiff asks for because it will appear small in
11:41AM 25 comparison to the amount of money that has been spent on

1 spectrum.

2 THE COURT: I know their argument is that by
3 arguing that the Defendants have all the spectrum they
4 need, they open the door to what the Plaintiff would
5 regard as a rebuttal of that.

11:41AM

6 I know that's an argument that will be taken up
7 in connection with that Daubert motion to decide whether
8 that is an admissible theory, and I will just make sure
9 that this issue that you are raising here in connection
10 with whether those large numbers are the sort that are
11 only being put up to skew the damages arising or whether
12 they have a proper and necessary role in the analysis.

11:41AM

13 So I'm going to carry that part of it to be
14 decided with that Daubert motion, but I will rule that
15 the other parts of the 10-K that we just talked about
16 are the subject of a negotiated redaction, and we will
17 be sure to set a final hearing time before the 23rd so
18 that if there are issues about any redactions ordered in
19 this process that we can get back to them and decide
20 them.

11:42AM

21 MS. BEDARD: Understood. Thank you, Your
22 Honor.

23 THE COURT: Thank you.

24 MR. SIM: Good morning, Your Honor. Charlie
25 Sim for the Defendants.

11:43AM

1 THE COURT: Good morning.

2 MR. SIM: When Your Honor's ready, I'd like to
3 move on to bucket 11, Android and Samsung technical
4 documents.

11:43AM

5 THE COURT: All right. Go ahead.

6 MR. SIM: These are three PowerPoint
7 presentations that were produced by Samsung in
8 connection with Headwater's subpoena to Samsung in this
9 case. All three of these documents are cited in

11:43AM

10 Headwater's infringement expert report for the truth of
11 the matter asserted in those documents, namely dozens
12 and dozens of citations that go to the operation of some
13 of the accused Android features in this case.

14 So I submit that these documents are hearsay in
15 that they were produced by a third party and are being
16 offered for the truth of the matter asserted and that no
17 exception applies to hearsay.

11:43AM

18 Samsung produced a representative for
19 deposition in this case. He was shown one of these
20 three documents, the exemplary document Plaintiff's
21 Exhibit 806. He expressed no familiarity with that
22 document, but Headwater did ask him one question that
23 goes to this issue. They asked, quote: Any reason to
24 believe that this is not a business record of Samsung?

11:44AM

25 Answer: No.

1 Plainly, a lay witness such as Samsung's
2 representative, who is not familiar with requirements of
3 the business records exception or any other exception to
4 hearsay, and there was no other deposition testimony
11:44AM 5 going to whether or not these documents would constitute
6 business records.

7 THE COURT: Mr. Sim, if these are along the
8 line of technical manuals or the like, typically I find
9 that those are nonhearsay in the sense that what is
11:45AM 10 important is what they describe about the technology,
11 not whether or not that's true.

12 Tell me more about whether these technical
13 documents are in that form or whether they are something
14 different than operating manuals or the like.

11:45AM 15 MR. SIM: Certainly, Your Honor. Maybe it
16 would be helpful if I show you our exemplary document,
17 if I may have the ELM0.

18 THE COURT: All right.

19 COURTROOM DEPUTY: Use the dial.

11:45AM 20 MR. SIM: I'm sorry?

21 COURTROOM DEPUTY: Use the dial.

22 MR. SIM: I'm sorry.

23 So I can flip through a couple pages here, but
24 all three of these documents were PowerPoint
11:46AM 25 presentations prepared by Samsung. They were all

1 designated confidential, attorneys' eyes only by Samsung
2 for production in this case. And for all purposes for
3 all review of these documents, it appears they were
4 generated for internal use by Samsung in both English
5 and Korean in instances. So I'll show you a few pages
6 of these documents.

7 Now, while the pages of these documents refer
8 at times to some of the features accused in this case,
9 they are by no means technical manuals; in fact, have
10 very little explanation narratively on them. They
11 appear to be used for some internal purpose at Samsung.
12 Samsung's representative at his deposition was not able
13 to provide any more information than that. But they are
14 not documents produced for wide dissemination, or
15 apparently even dissemination outside a specific team at
16 Samsung, for the purpose of explaining the nuances of
17 some of these features.

18 For instance -- I'm not sure you can see that
19 so well, Your Honor, but Headwater's expert in his
20 infringement report repeatedly replies on this page, in
21 addition to many other pages of this document, which
22 appears to reproduce source code, the origin of which is
23 unclear to us, but there is no narrative explanation as
24 to really what is going on on this slide. It is, at
25 best, simply a description of -- you know, I recognize

1 some variables here from the public source, Android
2 code, and all of that documentation is already on the
3 parties' joint exhibit list.

4 So does that answer Your Honor's question?

11:47AM

5 THE COURT: I think it does at this point.

6 Let me hear from Plaintiff as to why that
7 shouldn't be deemed hearsay.

8 MR. DAVIS: Thank you, Your Honor.

9 I also wanted to add that in addition to the

11:48AM

10 testimony Mr. Sim talked about from Samsung's witness
11 Mr. Schiksnis, he was also asked: Do you have any
12 reason to believe that any of the documents produced by
13 SEA -- that's Samsung Electronics America, who was
14 subpoenaed -- are not regular records of the company?

11:48AM

15 And, again, he said: No.

16 So the witness was asked. You know, we
17 attempted to establish he was not familiar with every
18 single document produced by Samsung.

19 I also wanted to raise this with respect to the
20 prior bucket that we addressed, Your Honor, because
21 those documents, those Samsung documents in bucket 6
22 like PTX797 in the Verizon case, those were also
23 produced by Samsung. That's -- those are documents that
24 Mr. Schiksnis was testifying about that --

11:49AM

25 THE COURT: I would have answered that question

1 the same way, though I don't think that establishes the
2 foundation you need.

3 MR. DAVIS: All right. So, Your Honor, the --
4 I think to your point, you know, these are deeply
11:49AM 5 technical documents. The network policy document that
6 is the exemplary PTX806, this has been testified about
7 extensively by Samsung's witnesses. In fact, all of the
8 documents in this bucket were testified about by
9 Samsung's witnesses.

11:49AM 10 You know, Verizon and T-Mobile in this case,
11 they are selling Samsung products. They point to
12 Samsung as the source of information about the technical
13 operation of Samsung products. Samsung, they have
14 indemnification agreements because Samsung is so deeply
11:50AM 15 involved in this case.

16 And so -- and I'll give you just another
17 example, Your Honor, that -- maybe two more. So as you
18 may recall, the Defendants also have a motion for
19 summary judgment of noninfringement with respect to the
11:50AM 20 '613 patent. That's based on a jury finding in the 422
21 case with respect to Samsung products.

22 So Defendants are saying that these materials
23 which were the subject of that case are so relevant and
24 so tied up in how the accused products work that they
11:50AM 25 should be granted summary judgment and, yet, they are at

1 the same time saying, you know, well, these documents,
2 these are just unreliable documents; who knows what they
3 mean. These are the documents from the Samsung 422
4 case. They shouldn't be able to have it both ways.

11:51AM

5 I'll also add, Your Honor, that they are
6 pointing to internal Samsung features. They are not
7 publicized as noninfringing alternatives. Those are not
8 described in public documents. They are from internal
9 Samsung documents like these.

11:51AM

10 Their expert report talks about this.
11 Paragraph 624 of Dr. Jeffay's opening report refers to
12 [REDACTED] and other internal Samsung
13 features. How does he know how these operate without
14 relying upon these types of Samsung documents.

11:51AM

15 So how is it that Defendants can use these
16 technical documents describing Samsung's features. They
17 are not in publicly available user guides. They are in
18 exactly documents like these, the internal Samsung
19 technical documents. How can they use them and, yet,
20 claim these documents are unreliable hearsay; we
21 couldn't possibly use them to substantiate claims about
22 how the accused products work.

11:52AM

23 THE COURT: Well, are you objecting to their
24 use of them?

11:52AM

25 MR. DAVIS: No, Your Honor.

1 THE COURT: Well, that's how they can use them.

2 MR. DAVIS: I'm sorry?

3 THE COURT: If you don't object, obviously I
4 can't address whether they are proper or not.

11:52AM

5 MR. DAVIS: I understand, Your Honor. I think
6 the point I'm just conveying is that this seems like a
7 disingenuous type of position from Defendants, that when
8 it suits their purposes, they think it's perfectly
9 permissible to use these technical documents to support
10 their claims, their assertions. But when the Plaintiff
11 uses them, these documents from an indemnifying third
12 party, who the Defendants agree is the definitive source
13 on how the products that they sell work, they say that
14 these are unreliable documents.

11:53AM

15 THE COURT: I assume that when you talk about
16 the Defendants are using them, you are saying that their
17 experts rely upon them in their reports?

18 MR. DAVIS: That's right, Your Honor.

11:53AM

19 THE COURT: And so do yours. And they are not
20 trying to keep your expert from relying on them. It's
21 just a question of are they admissible to the jury, and
22 that's the issue that we are currently exploring.

23 MR. DAVIS: I understand, Your Honor.

24 I'll add as well that there are

11:53AM

25 SAM-THIRDPARTY -- that was the Bates number used by

1 Samsung in this case -- there are SAM-THIRDPARTY
2 documents on both the joint exhibit list and on
3 Defendants' exhibit lists.

11:54AM

4 THE COURT: Well, I understand that. I don't
5 know what you want me to make of that, though. I need
6 an argument that's based on the rules of evidence.

11:54AM

7 MR. DAVIS: I understand, Your Honor. I think
8 the view that we took was I thought, in our view, a
9 principled stand that we are not going to try to have it
10 both ways like we think the Defendants are trying to do
11 and so that's why we didn't raise objections to the same
12 documents or the same types of documents that Defendants
13 are relying upon.

11:54AM

14 THE COURT: Well, I guess to follow that line
15 of argument, are you saying that the Defendants are
16 seeking to admit Samsung internal presentations?

11:55AM

17 MR. DAVIS: I'm not certain, Your Honor, what
18 the specific Sam third-party documents are on their
19 list. I can check that. I don't -- it's not these
20 documents, I can certainly tell you that much.

21 THE COURT: Obviously these are multipage
22 presentations. It is possible that as to some
23 presentations, the outcome would be differently, I mean
24 some pages.

11:55AM

25 What part of -- I think we're looking at 806.

1 What part of that are you specifically seeking to use
2 with the jury?

3 MR. DAVIS: Yes. Sure, I can explain that,
4 Your Honor. If I may have the ELM0.

11:55AM

5 So the first slide I would point to is Slide 3.
6 This is simply a list of accused features. These are
7 network access rules, and it's part of the network
8 policy. The claim term is apply a policy. And the
9 power saving mode is accused, doze mode is accused, app
10 standby, data saver, roaming reduction, all accused.

11:56AM

11 On Slide 4, what we would point to, Your
12 Honor -- and I won't belabor the point because it's very
13 small type -- but what we see here is there are certain
14 elements of the Samsung system that existed prior to the
15 claimed inventions, but there are other aspects,
16 especially including this middle aspect here, that
17 existed after the claimed inventions.

11:56AM

18 And so much like in the Samsung cases, the
19 Defendants here, their lead prior art reference is a
20 prior art Android device. And so we would point out
21 that, well, these pieces, or aspects of those pieces,
22 did exist before, as you're suggesting, but then later
23 the network policy was added and that's what was accused
24 of infringing.

11:56AM

11:57AM

25 From there, Your Honor, it's -- you know, there

1 may be little bits that we would point to, including the
2 excerpt that Mr. Sim pointed out, where we have, for
3 example, some code variables that are reflected in
4 Android code and also Samsung code.

11:57AM

5 I'll add for the record, Your Honor, that
6 Samsung did make available, albeit a bit belated, did
7 make available source code for inspection. Headwater
8 inspected it; Defendants did not. They chose not to,
9 for whatever reason. But, you know, pointing to sort of

11:58AM

10 variables about how the accused products work, the
11 firewall rules that are set that show the blocking of
12 network access.

13 I don't know if that answers your question,
14 Your Honor, if that gives you a sense of the specifics
15 of how we would use a document like this.

11:58AM

16 THE COURT: And do you have physical copies of
17 the -- of 806 and 804, or are they the same?

18 MR. DAVIS: We do. I'm sorry. 804 is the --

19 THE COURT: The T-Mobile version?

11:58AM

20 MR. DAVIS: Yes. It's the exact same, Your
21 Honor.

22 THE COURT: All right.

23 MR. DAVIS: So, and we do have physical copies
24 of all three documents in this bucket, which, each of
25 which has a Verizon number and a T-Mobile number.

11:58AM

1 THE COURT: All right. If you would hand those
2 up, I'm going to look at those over the lunch hour, and
3 we'll resume with this after the lunch.

4 MR. DAVIS: Certainly. Thank Your Honor.

11:59AM

5 THE COURT: And we'll be in recess until
6 1 o'clock. And if you would just pass those to
7 Mr. Saltz, he'll bring them.

8 MR. DAVIS: Thank Your Honor.

9 (Recess from 11:59 a.m. to 1:06 p.m.)

01:06PM

10 THE COURT: I believe we are on bucket 11 of
11 the Plaintiff's exhibits. And over the lunch hour, I
12 looked more closely at PTX806, 808, and 717, which are
13 the exhibits in the Verizon bucket.

14 Mr. Davis, could I ask you a few questions
15 about those?

01:07PM

16 MR. DAVIS: Yes, Your Honor.

17 THE COURT: The 806 document, is that one that
18 you can confirm comes from Samsung?

19 MR. DAVIS: Yes, Your Honor. All three of them
20 do.

01:07PM

21 THE COURT: Well, and by "comes from," I mean
22 was created by?

23 MR. DAVIS: Oh. Yes, that is true for all
24 three of them.

01:07PM

25 THE COURT: Well, it does not appear to be the

1 case for -- 717 says it's from communications research
2 team?

3 MR. DAVIS: Oh, let me take a closer look at
4 that one, Your Honor.

01:07PM

5 THE COURT: All right.

6 MR. DAVIS: I see. Your question, Your Honor,
7 is: Is communications research team something within
8 Samsung --

9 THE COURT: Yes.

01:08PM

10 MR. DAVIS: -- as opposed a third party?

11 THE COURT: That is my question.

12 MR. DAVIS: I believe that's within Samsung,
13 Your Honor. And where I come up with that is the -- in
14 the lower left corner of --

01:08PM

15 THE COURT: I do see that now. In the fine
16 print, at the bottom of each slide, it says: Samsung
17 DMC R&D communications research team.

18 MR. DAVIS: That's right, Your Honor. Yes, so
19 that's our understanding that this is a team within
20 Samsung.

01:09PM

21 THE COURT: Quite a lot of 717 is not in
22 English?

23 MR. DAVIS: Yes, that's right.

24 THE COURT: What would you propose that the
25 jury do with that?

01:09PM

1 MR. DAVIS: So I think, Your Honor, we've
2 handled that in a variety of different ways. We could
3 provide a translated version. We could also provide a
4 version that slims down this document, since it does
01:09PM 5 span 17 pages and just focuses on particular portions
6 that either have no Korean on them or a much longer
7 amount of Korean on them and then provide translation of
8 that if needed.

9 THE COURT: What is your understanding of what
01:10PM 10 717 was created for?

11 MR. DAVIS: I believe this is -- so this is
12 explaining two different features, doze and app standby,
13 that were released in Android version M, or Marshmallow.
14 So my understanding is that this sort of explains
01:10PM 15 internally within Samsung what these features do, how
16 they are implemented and what they provide, when we see
17 various state diagrams and explanations and the like for
18 it.

19 THE COURT: And have you obtained any testimony
01:10PM 20 from anyone with Samsung about 717?

21 MR. DAVIS: Yes. There was some testimony. I
22 have the citation I need to pull up the testimony. That
23 is from -- let's see -- the February 29, 2024 deposition
24 of Mr. HongJung Son, who was Samsung's 30(b)(6)
01:11PM 25 designee. This was Exhibit 12 to that deposition. I

1 don't believe this was a document he personally created.
2 He did create the PTX808, so he was able to explain
3 that. I don't believe he created PTX717.

01:12PM

4 THE COURT: Frankly, 808 appears to me to be an
5 evaluative document. It is, in large part, comparing
6 Google and Samsung as opposed to a technical document
7 about the performance characteristics of Samsung, which
8 806 appears to me to be.

01:12PM

9 MR. DAVIS: I see. Yeah. Your Honor, I can
10 explain 808 a little bit as well. I think the primary
11 portion of 808 is the timeline that begins on page 17 of
12 the document, where -- this may be what Your Honor's
13 referring to where there's a timeline up above for
14 Samsung and a timeline below for Google, and they were
15 sort of proceeding on these parallel tracks of providing
16 power-saving functionality, and over time, we see that
17 some of it blends together as well.

01:13PM

18 There are enhancements made. There are [REDACTED]
19 [REDACTED] that appear on the Google side and also on the
20 Samsung side. And so I think what Mr. Son was
21 explaining there is how in Android S oS -- that's the
22 name of the presentation -- the Android S operating
23 system release, how different power-saving features
24 operate, some of those being Samsung-created, like
25 [REDACTED], and others being created by Google for

01:13PM

01:13PM

1 purposes of Android generally. And so they are all
2 features that are part of the Samsung products by virtue
3 of Samsung practicing Android and then additionally
4 having some of their own power-saving features like

01:14PM

5 [REDACTED].

6 THE COURT: Both 717 and 808 appear to me to
7 have large components that are in a classic hearsay use
8 where the relevance would be the truth of the matter
9 asserted. 806 appears to me to be more of just a
10 technical performance manual or explanation. So I think
11 in order to get 717 and 808 in, you would need to have a
12 business record foundation.

01:14PM

13 MR. DAVIS: I see, Your Honor. Yeah, that --
14 understood. To that point, the deposition testimony I
15 was referring to on PTX717, Mr. Son was asked -- the
16 exhibit was introduced with him. We asked: This was
17 also a confidential document produced from Samsung's
18 records?

01:15PM

19 He says: I see it starts with a Sam Bates
20 number. I would gather that it is a Samsung document.

01:15PM

21 We asked: What is the DMC R&D center?

22 He says: That group no longer exists, but it's
23 a research center.

24 So he testified about this document. He did
25 not write this document like he did the other PTX808.

01:15PM

1 THE COURT: A critical part of 803(6) is
2 evidence that the contents were added by a person with
3 knowledge at or about the time described as opposed to a
4 historical record, and I'm afraid that that testimony
5 that you refer to so far is not relatively close to an
6 803(6) declaration, especially if what you're after is a
7 timeline and one that compares it to another product.

01:16PM

8 So do you have anything else on the business
9 records side?

01:17PM

10 MR. DAVIS: On 808, give me just a moment. Or
11 I don't know if it would be most efficient for me to
12 sort of revisit this once I can locate it in the -- in
13 Mr. Sun's deposition transcript.

01:17PM

14 THE COURT: If you want to come back to this at
15 the end of the day, I'll give you that opportunity; but
16 at this point, I'm going to sustain the hearsay
17 objection to 717 and 808 and overrule the objection to
18 806.

19 MR. DAVIS: Understood, Your Honor. Thank you.

01:18PM

20 MR. VINCENT: Your Honor, with respect to
21 buckets 12 and 13, those are wholly T-Mobile exhibits,
22 for the T-Mobile case, and at least the last bucket is
23 directly relevant to one of the T-Mobile MILs that will
24 be argued that will go a long way, if not completely
25 resolve the objections that are for that bucket of

01:18PM

1 exhibits.

2 If it's all right with Your Honor -- I've
3 cleared with counsel -- we would propose to postpone
4 argument on those exhibit buckets for T-Mobile until
01:18PM 5 after the argument of the T-Mobile MILs because it's --
6 at least for the last bucket, those arguments will
7 largely overlap.

8 THE COURT: All right. Then we'll move on to
9 the Defendants' exhibits.

01:19PM 10 MR. DAVIS: Thank Your Honor.

11 This takes us to bucket 1 that's applicable to
12 both Verizon and T-Mobile. The representative exhibit
13 here is DTX113 in the Verizon case. And the issue that
14 we have here, how this bucket got its name "ItsOn bugs"
01:19PM 15 is there are a number of documents -- this is one of
16 them on Defendants' exhibit list -- where they want to
17 portray the ItsOn software as sort of defective in some
18 way, and we think this is just totally irrelevant
19 because the bugs that they are pointing to have nothing
01:20PM 20 to do with the accused functionality, program background
21 determinations, interaction of users, et cetera. They
22 have to do with things like what we see here on the
23 slide.

24 This is Slide 12 in our presentation. We have
01:20PM 25 an email from Dr. Raleigh to someone else at ItsOn, and

1 what he's saying is: My father is a Virgin DDR
2 subscriber. That means data done right. That was a
3 program using the ItsOn software. And he's saying that
4 the device is hung up in activation process. He says
01:20PM 5 there are fatal bugs that he encountered in trying to
6 activate a phone that he was demonstrating to customers
7 as well. What Defendants like about a document like
8 this is, see, it says fatal bugs; these are a big
9 problem; the ItsOn software was bad.

01:21PM 10 Well, at the end of the day, Your Honor, these
11 are -- we think these are just normal software
12 development bugs; but even if they are a serious
13 problem, it has to do with an activation process that
14 has nothing to do with the claimed functionality.

01:21PM 15 And so we think these sorts of documents are
16 just being introduced purely to prejudice the jury into
17 making an improper comparison of the accused products to
18 the ItsOn software or something to that effect. We
19 think it's just not relevant.

01:21PM 20 THE COURT: All right. And everything in this
21 bucket is of that nature?

22 MR. DAVIS: That's right, Your Honor. The only
23 thing I would add is that Defendants also, they can't
24 use this material for secondary considerations. They
01:22PM 25 have no expert opinions on that. Their damages experts

1 don't rely on these materials and so it's unclear how
2 they would even use them at trial.

3 THE COURT: I assume Dr. Raleigh will testify?

01:22PM

4 MR. DAVIS: Yes, they -- that's right, Your
5 Honor. They could certainly use them, you know,
6 cross-examination-wise and that's essentially what we
7 have seen in prior Headwater cases.

8 THE COURT: All right. Did we address this in
9 prior Headwater cases?

01:22PM

10 MR. DAVIS: This did come up, I believe, in the
11 103 case. I don't believe it did in the 422 case, if
12 memory serves.

13 THE COURT: And I assume it was admitted?

01:23PM

14 MR. DAVIS: Yes, Your Honor. This was -- I
15 don't believe this specific document, but things of this
16 nature about the subject of ItsOn bugs were allowed.

17 THE COURT: And if I'm recalling correctly, it
18 was on the theory that the Plaintiff will be bolstering
19 ItsOn, and the Defendant sees this as rebuttal to that?

01:23PM

20 MR. DAVIS: I'm not sure if that was exactly
21 Samsung's argument, but -- and I'm not sure that that's
22 Defendants' argument here exactly. But to that point,
23 you know, I think our issue is just we want to prove for
24 marketing and other purposes that the ItsOn software
01:23PM 25 practiced the '541 patent. Practicing the patent

1 doesn't have anything to do with being successful
2 through an activation process or anything like that.

3 So I think where we are drawing the line, Your
4 Honor, is -- and trying to do it in a principled way is
01:24PM 5 that ItsOn is relevant, but this type of thing is not
6 relevant because it's sort of poisoning the well about
7 ItsOn on something entirely unrelated to the accused
8 functionality.

9 If Defendants had evidence of problems with the
01:24PM 10 ItsOn software with something related to the patent
11 claims, like determining foreground versus background or
12 something to that effect, I think we would see that as
13 relevant, but what we see in these ItsOn bugs documents
14 is just unrelated.

01:24PM 15 THE COURT: All right. And so 403 is the
16 primary rule you're relying on?

17 MR. DAVIS: That's right, Your Honor.

18 THE COURT: All right. Thank you, Mr. Davis.

19 MS. DOMINGUEZ: Good afternoon, Your Honor.

01:25PM 20 Kate Dominguez for Defendants.

21 The first thing I want to do is clarify the
22 record on whether this was raised only in the 103
23 Samsung matter or also in the 422. It was actually
24 raised and addressed in the objection. Headwater's
01:25PM 25 objection overruled in both cases.

1 I would refer you to, in the 422 case, Docket
2 Number 351. That's the pretrial hearing transcript. At
3 page 221, lines 17 through 18 was Your Honor's ruling
4 allowing these types of exhibits over the exact same
01:25PM 5 objections that the Plaintiff is making here. And then
6 in the 103 case, I would refer Your Honor to Docket 360
7 at page 2. That was the order denying Plaintiff's
8 MIL 2.

9 For the same reasons for the Court's ruling in
01:26PM 10 both of those cases, Defendants submit that these are
11 incredibly important documents to counter the one-sided
12 narrative that Headwater wants to present.

13 So over Defendants' objections, which we've
14 been arguing since last week and in many, many different
01:26PM 15 papers across our SJs, our Dauberts, our MILs, Headwater
16 insists on injecting ItsOn and its products and its
17 business into every aspect of this case.

18 Every one of Headwater's experts uses ItsOn's
19 products and its business to bolster the asserted
01:26PM 20 patents and claim they are valuable, that they provide
21 benefits. As Your Honor, I'm sure, knows, we have
22 Dauberts on much of those discussions because, as set
23 forth in our papers, they are using their experts as
24 nothing more than mouthpieces for facts, or Headwater's
01:27PM 25 view of the facts. But if Headwater is going to be

1 talking about ItsOn, and we know that they are, and
2 showing one half of the story and claiming that because
3 ItsOn used the patents, it provided all these benefits,
4 in fairness, we need to be able to present the other
5 side of the story. And what these products show is that
6 the same products that Headwater is waving around as
7 evidence of benefits of using the Headwater patents,
8 those products were actually a massive failure. They
9 caused serious problems rather than delivering benefits.

10 And I would just note: I don't think that the
11 document that has been selected here, which is DX113 in
12 the Verizon case and DX115 in the T-Mobile case, is
13 representative on that, on that front because I think --
14 we think that's relevant anyway because it goes to some
15 of the reasons for the failure of ItsOn, and that's also
16 an issue in the case, which I'll get to.

17 But as to being focused on the activation
18 process, many, many other documents -- and they are in
19 this bucket, and we can pull them up and look at them if
20 Your Honor would like -- they are not specific to the
21 activation process, and they do go to the functionality
22 that Headwater is attempting to connect to the patents
23 in this case.

24 THE COURT: Ms. Dominguez, I'm satisfied that
25 I'm going to overrule the objection to this bucket, as

1 in the past, and I'll give Plaintiff an opportunity to
2 tell me if the next bucket should be distinguished.

3 MS. DOMINGUEZ: Thank Your Honor.

4 THE COURT: Thank you.

01:28PM

5 MR. DAVIS: Your Honor, so the next bucket is
6 also related to ItsOn. I -- there are distinguishable
7 in the sense that they don't focus on bugs, but I think
8 given Your Honor's ruling on bucket 1, I don't think you
9 are going to be persuaded by our position on bucket 2.

01:29PM

10 THE COURT: I suspect you're right.

11 MR. DAVIS: So --

12 THE COURT: I don't really know bucket 2,
13 but --

01:29PM

14 MR. DAVIS: So let me just very briefly talk
15 about one of those documents.

16 THE COURT: All right.

17 MR. DAVIS: So one of those documents that I'll
18 show up on the screen, Your Honor, is the assignment.

01:29PM

19 We see this on the left side of the screen, the
20 assignment from ItsOn to ItsOn ABC.

21 We think this is just confusing to a juror that
22 we're introducing this idea of an entity for an
23 assignment for the benefit of creditors. We see no
24 reason for something like this in the case in that it
01:30PM 25 has nothing to do with the relevant issues for ItsOn,

1 certainly nothing about the technical merits or anything
2 like that.

3 THE COURT: The subject of that document I
4 don't think is problematic. There may be details in it
01:30PM 5 that are. Part of the ruling on the issue about
6 spoliation is that the parties are permitted to tell the
7 jury that certain documents are not available following
8 the liquidation of ItsOn. So the fact that there was a
9 liquidation I don't think is problematic.

01:31PM 10 If there's something in here that the
11 Defendants would rely on to suggest that Headwater is
12 responsible for the absence of those documents, then
13 that's something that I think should not be allowed.
14 But I don't have enough understanding of this general
01:31PM 15 assignment, as I sit here, to know whether that's true.

16 Do you?

17 MR. DAVIS: No, I don't believe so, Your Honor.
18 I don't believe there's anything in particular in that
19 document that is along the lines of what you're
01:31PM 20 describing.

21 THE COURT: I don't see a problem with the jury
22 knowing that ItsOn failed. I think that is something
23 that is unavoidable. So if that is the nature of your
24 objection to the assignment, I'll overrule that.

01:31PM 25 MR. DAVIS: Understood, Your Honor.

1 And the reason I'm still standing here is just
2 that I'm handling the next bucket.

3 THE COURT: Okay. If I want you to sit down, I
4 will tell you.

01:32PM 5 MR. DAVIS: Okay. Thank you.

6 THE COURT: All right. So I'll overrule the
7 objections in the second bucket.

8 MR. DAVIS: All right. So there was previously
9 a bucket 3 that's been withdrawn in light of a MIL
01:32PM 10 ruling, so that takes us to bucket 4. That is called
11 unelected prior art. There is just one exhibit in this
12 bucket. We see it on the screen here at our Slide 14.
13 It's a user guide. It's about 200 pages long. It's a
14 user guide for a product called the T-Mobile myTouch 3G
01:32PM 15 slide.

16 This is not a prior art reference that is being
17 used as part of an invalidity mapping in this case, so
18 it's unelected prior art. Introducing that evidence
19 would directly violate court MIL Number 4, which
01:33PM 20 obviously Your Honor's familiar with. So the user
21 guide's not relevant; the product it describes is not
22 relevant.

23 I think what we heard through the
24 meet-and-confer process with Defendants is that they
01:33PM 25 believe it's relevant to discuss state of the art. I

1 think the problem there, Your Honor, you know, it's
2 especially a slippery slope in this particular instance
3 because their prior art reference is a different
4 T-Mobile device. It's called the T-Mobile G1, entirely
01:33PM 5 different smartphone. But I think especially because of
6 that fact that they are relying on a different T-Mobile
7 smartphone, I think it would be particularly confusing
8 to the jury and they may blend this together with the
9 T-Mobile G1 when that's not something that Defendants'
01:34PM 10 expert has analyzed.

11 And, again, just reiterating that this is a
12 very substantial document. It's around 200 pages. It
13 has a whole lot of detail in it and so we don't see this
14 as just a basic document to show something, you know,
01:34PM 15 generic about the state of the art.

16 THE COURT: All right. Let me hear the
17 response.

18 MR. VINCENT: Yes, Your Honor.

19 The response is straightforward. It's not just
01:34PM 20 state of the art, and it's -- I think Plaintiff's
21 counsel has a misunderstanding of what our elected art
22 is. The election of art is the Android system art.
23 It's the Android 1.6 operating system running on these
24 prior art devices.

01:34PM 25 We have an exemplary device, the T-Mobile G1

1 device by HTC. This user manual is from another HTC
2 device, and it's cited in our expert reports to describe
3 the functionality of the very feature that we are seeing
4 renders obvious the asserted claims.

01:35PM

5 It is the Android feature that is we are
6 asserting renders obvious the patents, and he is using
7 this user guide to explain how that feature worked on
8 devices at the time. And so it's not unelected. It's
9 not simply state of the art. It goes directly to our

01:35PM

10 theory of an invalidity and how this Android system art
11 works, whether it's on a T-Mobile HTC G1 phone or an HTC
12 myTouch phone.

13 The functionality -- I think he talks about
14 this in his report that the functionality is the Android
15 1.6 functionality that was at issue.

01:35PM

16 THE COURT: Do you have another phone that is
17 elected prior art?

18 MR. VINCENT: We have a physical T-Mobile G1
19 phone, and the purpose of using this myTouch user guide
20 is it has descriptions of the exact same Android feature
21 that is at issue that will help the jury understand how
22 it worked.

01:36PM

23 It's a contemporaneous document. There's no
24 question about whether it was -- whether it's an
25 authentic document, whether it actually applies to the

01:36PM

1 correct Android version, and it explains how this
2 functionality works.

3 There's no dispute, as far as I'm aware, that
4 the Android, at least at this -- for admissibility
01:36PM 5 purposes that the Android 1.6 somehow worked differently
6 on the T-Mobile G1, the HTC G1 versus the HTC myTouch.
7 The description of the Android feature is what's
8 important.

9 We also have a myTouch phone as well. We have
01:37PM 10 a physical phone of the myTouch as well. So, again, we
11 are not limiting ourselves to a particular device. The
12 point is the Android features and the Android source
13 code 1.6, that is what is rendering it obvious. We have
14 phones that we can demonstrate had that version of the
01:37PM 15 software on it to prove up that it was, you know,
16 released and on phones and in customers' hands.

17 THE COURT: But this HTC myTouch 3G phone is
18 not any art that you are relying on for invalidity?

19 MR. VINCENT: I'm sorry. No, the myTouch phone
01:37PM 20 is something. We have -- we have the physical device.

21 THE COURT: This myTouch 3G phone, that's what
22 the exhibit is about, right?

23 MR. VINCENT: Yes, Your Honor.

24 THE COURT: And are you relying on that phone
01:37PM 25 as prior art?

1 MR. VINCENT: Yes, Your Honor, that's -- it's
2 explained in our expert report. Now, which particular
3 phone we bring to trial, well, that's to be determined,
4 but we are going to use -- we have made this phys- --
5 this device was mentioned in our expert reports, relied
6 on, running Android 1.6 for this feature that we're
7 relying on this manual for.

01:38PM

8 So, again, it is the Android system that is in
9 our reports that we are relying on.

01:38PM

10 THE COURT: And you listed it as one of your
11 priority art references in your disclosure?

12 MR. VINCENT: Yes, Your Honor. We elected --
13 again, it's the Android system art is how we described
14 it, and I don't -- I'm not aware of any objection to our
15 articulation of how we described that art.

01:38PM

16 The Android system art again is, this is the
17 same art that was at issue in the Samsung 422 case. It
18 is the same operating system, Android Version 1.6. We
19 are relying on that version of Android as it appeared on
20 devices before the priority date of the patents.

01:38PM

21 THE COURT: And so what I'm getting at is are
22 you separately listing the devices as prior art, or just
23 the Android operating system?

24 MR. VINCENT: I think the way we articulate
25 it -- again, this is, I think, my view, a ministerial

01:39PM

1 matter of proving up the availability of the prior art.
2 We are relying on the Android operating system, but we
3 have to show it was on phones that were sold before the
4 priority date and so that is why the physical devices
01:39PM 5 come into play. There's nothing unique about them.
6 It's just that --

7 THE COURT: I understand. It's a simple
8 question. Have you listed the devices on your election
9 of prior art, or are you just relying on the Android
01:39PM 10 operating system?

11 MR. VINCENT: The answer is yes, Your Honor. I
12 apologize for misunderstanding your question.

13 THE COURT: Okay. And so the initial objection
14 I heard was that this particular phone is not listed;
01:39PM 15 you're telling me it is?

16 MR. VINCENT: That's my understanding it is
17 listed in our election.

18 THE COURT: Okay. Thank you, Mr. Vincent.
19 Mr. Davis, tell me why you disagree.

01:40PM 20 MR. DAVIS: So, Your Honor, we'll talk more
21 about this when we get to bucket 6 as well, but the
22 Defendants' exhibit list has a physical T-Mobile G1
23 device. It has as another exhibit screenshots of a
24 physical T-Mobile G1 device.

01:40PM 25 I don't -- I didn't see on their exhibit list.

1 Is there a particular exhibit number for the T-Mobile
2 myTouch 3G Slide phone? I don't believe it's on their
3 exhibit list.

01:40PM

4 THE COURT: Well, right now I'm not asking
5 whether it's on their exhibit list. I'm asking whether
6 it's on their list of elected prior art.

7 MR. DAVIS: On their 282 notice, Your Honor?

8 THE COURT: I guess.

01:41PM

9 MR. DAVIS: It may be, Your Honor. I haven't
10 had time to check just now.

11 THE COURT: Well, isn't that the objection
12 you're making?

01:41PM

13 MR. DAVIS: Well, the objection is our
14 understanding has been that they are relying upon the
15 T-Mobile G1 physical device. They need a system. The
16 system is the T-Mobile G1 running a particular version
17 of Android.

01:41PM

18 If they want to make -- if their prior art
19 argument is just here's what the Android code said, then
20 that to me would be a different argument. It sounds
21 like what they are saying now is they have arguments
22 about a T-Mobile G1 system and arguments about a
23 T-Mobile myTouch 3G Slide system and that we can sort of
24 mix and match any documents about any of those. And
25 that's potentially the problem that we see.

01:41PM

1 THE COURT: What is your basis for arguing that
2 this particular phone is not elected prior art?

3 MR. DAVIS: We didn't see that mapped. It's
4 briefly mentioned in Dr. Jeffay's opening report on
01:42PM 5 invalidity. It's mentioned in passing as, you know, an
6 example of a prior art device that had Android software
7 on it, but we did not see that as part of the mapping
8 and I think probably got the indication from their
9 exhibit list as well that the system they are intending
01:42PM 10 to run at trial is a T-Mobile G1.

11 I'll add, Your Honor, that none of this came up
12 during the meet-and-confer process as well. This sort
13 of idea that, "Oh, we're just using it as another
14 example of the same Android read," that's news to me as
01:43PM 15 of when Mr. Robb just stood up now.

16 THE COURT: All right. What's wrong with their
17 position?

18 MR. DAVIS: So I think, Your Honor, it's simply
19 that my understanding is they need to show a prior
01:43PM 20 art -- if they want to run system prior art, they need
21 to choose a system, show that it was available, and then
22 map it to the claims. I believe they have attempted to
23 do that with the T-Mobile G1. They produced evidence
24 that they believe shows that it was publicly available
01:43PM 25 and sold. I don't know that they have established all

1 of that, and I don't think Mr. Robb tried to say that he
2 has with respect to the T-Mobile myTouch 3G Slide.

3 THE COURT: These are not documents that are
4 filed in the record, at least customarily, so I don't
01:44PM 5 have access to them. Do you want to show me where you
6 think this should have been and it's not?

7 MR. DAVIS: I can try to do that, Your Honor.

8 THE COURT: Well, I don't see how else I'm
9 going to resolve this dispute.

01:44PM 10 MR. DAVIS: So, Your Honor, I apologize. I may
11 not be able to provide exactly what you're looking for.
12 I know their invalidity report mentions the G1 114
13 times. It mentions the myTouch 3G Slide five times in
14 sort of incidental introductory paragraphs, just saying
01:45PM 15 that there are prior art cellular phones.

16 They talk about a Samsung phone, an HTC Nexus
17 One phone. But in the actual stepping through claim
18 mapping, they talk about the T-Mobile G1 throughout
19 their report many, many times and so that I think is
01:45PM 20 what gave us the impression.

21 I mean, for example, Your Honor, I'm reading
22 directly from Claim 1 is rendered obvious by the
23 T-Mobile G1 running Android 1.6. For the reasons set
24 forth below, it is my opinion that Claim 1 of the '541
01:45PM 25 patent is invalid as being at least rendered obvious by

1 the T-Mobile G1 running Android 1.6.

2 That sounds very different from what Mr. Rob
3 was just saying. I would expect the expert report to
4 read, if that were the theory, it would say something
01:46PM 5 more like: It's my opinion that Claim 1 is rendered
6 obvious by any number of prior art phones running
7 Android 1.6. Instead, they specifically call out the
8 T-Mobile G1. That's why we think that the myTouch is
9 unelected, because they don't have a claim mapping for
01:46PM 10 it.

11 THE COURT: All right. Thank you, Mr. Davis.

12 Mr. Vincent, would you show me where you have
13 identified the HTC myTouch 3G, the one that's described
14 in this exhibit, please?

01:46PM 15 MR. VINCENT: Yes, sir. It is on our 282
16 statement. It is listed specifically, and --

17 THE COURT: Can you show me that?

18 MR. VINCENT: Yes, Your Honor.

19 If I could have the ELM0, please.

01:47PM 20 This is our 282 statement -- well, here you
21 have both the G1 and the myTouch, if it will stay on
22 long enough. Both of those devices are listed, along
23 with the relevant Android prior art -- sorry, the prior
24 art code versions. Again, that is the basis of
01:47PM 25 Dr. Jeffay's opinions is that it's -- there's nothing

1 device-specific about the theory. It is the device
2 running Android 1.6, which he explains.

3 They have not moved to strike -- they have not
4 moved to strike those opinions, nor is there any
01:47PM 5 indication by any expert that the description of the
6 accused -- of the prior art feature in this user guide
7 that's the issue of this discussion is inaccurately
8 describing how the feature worked in the prior art.

9 THE COURT: All right. I do see that listed in
01:48PM 10 what's in the record as Document 285 on page -- let me
11 see.

12 MR. VINCENT: I have page 4. I don't have the
13 docket number on this copy that I have, but it's on
14 page 4 of my version.

01:48PM 15 THE COURT: All right. Well, I see it there as
16 the T-Mobile myTouch 3G Slide manual?

17 MR. VINCENT: Yes, Your Honor.

18 THE COURT: All right. Thank you.

19 MR. VINCENT: Thank Your Honor.

01:48PM 20 THE COURT: Mr. Davis, is your complaint just
21 that you don't think it was adequately charted in the
22 expert report?

23 MR. VINCENT: Yes, Your Honor. I mean, I think
24 that is right. That they don't even have Rule 26
01:49PM 25 support for a mapping with the myTouch 3G Slide.

1 We can look at -- maybe the easiest thing to
2 look at, I was reading an example in the claim mapping.
3 Maybe the easiest thing to look at would be the table of
4 contents. I can show you on the ELM0, just briefly.

01:49PM

5 So you can see there is mapping of the
6 T-Mobile G1. There are sections dedicated to the
7 T-Mobile G1. The myTouch slide is not mentioned in
8 those mappings of the G1. It's a different system.

01:49PM

9 THE COURT: I think they have adequately
10 disclosed it as prior art and, therefore, I will
11 overrule the objection to its admission.

12 We can go to bucket 5, which is DX1.

13 MR. DAVIS: Yes, Your Honor.

01:50PM

14 So this one, bucket 5 we've titled
15 unauthenticated and hearsay prior art documents. That
16 kind of gives you the basis for our objection. The
17 representative exhibit here, all of this has to do with
18 a prior art system called JuiceDefender, and

01:50PM

19 JuiceDefender is a third-party software product. It's
20 used in some of Defendants' obviousness combinations.
21 The documents are unauthenticated/hearsay. There's no
22 testimony, no leaking information to overcome those
23 objections.

01:51PM

24 This is -- what you see on the screen, Your
25 Honor, on Slide 15 is an exemplary excerpt of one of

1 these. It's a Lifehacker website that says:

2 JuiceDefender saves batteries by automating Android
3 data.

01:51PM

4 This is clear hearsay, and we would submit much
5 more so objectionable hearsay than something from an OEM
6 partner. JuiceDefender is not something that's produced
7 by anyone related to this case. There's no deposition
8 to support it, et cetera.

9 THE COURT: All right.

01:52PM

10 MR. VINCENT: Your Honor, I guess we were
11 surprised to hear this objection given that these
12 exhibits were originally on the filed joint list and
13 didn't realize there was an issue to be had here.

01:52PM

14 These JuiceDefender articles, at least the vast
15 majority of them subject to this objection, were at
16 issue in the Samsung litigation. Samsung had a
17 declaration from the archive custodian explaining,
18 authenticating at least the versions on the Internet
19 archive, showing how that's done and authenticating
20 them.

01:52PM

21 They were admitted in the Samsung litigation,
22 and we were under the impression that we had an
23 agreement that they would be -- that we didn't need to
24 go through and get an identical or nearly identical
25 declaration to admit them here.

01:52PM

1 We can do so. It seems to me that's -- seems
2 unnecessary busywork to get, again, identical or nearly
3 identical declaration to show that these articles were,
4 in fact, on the Web at the time, before the priority
01:52PM 5 date. I mean, that's essentially, I understand, what
6 the objection is.

7 So, again, Plaintiff is continually giving, and
8 today handed Your Honor a declaration from a third party
9 authenticating documents. If that's what Your Honor
01:53PM 10 rules is necessary, we can do that. We can again get an
11 identical declaration from Mr. Wright, or near-identical
12 as what was produced in Samsung, if that's what Your
13 Honor rules. But, again, I think the issue is simply we
14 were under the impression we had an agreement here.

01:53PM 15 Obviously we don't. If we need to authenticate them, we
16 can do that, but again, I think that's what the issue is
17 here.

18 THE COURT: You know, it's not just my rule,
19 Mr. Vincent. It's the Federal Rules of Evidence.

01:53PM 20 MR. VINCENT: Understood, Your Honor.

21 THE COURT: Okay. Well --

22 MR. VINCENT: The issue is, again, it was our
23 understanding that these materials were produced and
24 made available in not just Samsung, and we disclosed the
01:53PM 25 JuiceDefender as part of our prior art disclosures

1 throughout the case. And, again, like, we were under
2 the understanding that there was an agreement that we
3 would have to go through the hoops to do this. But we
4 have the declaration here from the Samsung case that
5 applies to some of these very articles we're talking
6 about, and to the extent we need to do that for any
7 remaining stragglers, we can do that as well.

01:54PM

8 THE COURT: Do you have anything in writing
9 about the agreement you're referring to?

01:54PM

10 MR. VINCENT: That I'm not aware of, Your
11 Honor. I wasn't part of those negotiations. It was on
12 the joint list that we filed with the court as an agreed
13 exhibit. So obviously it got on the joint list that was
14 filed in this case. These exhibits were on that list.
15 So I think at least we have that evidence to at least
16 show that we understood there was an agreement there for
17 these exhibits.

01:54PM

18 Now, again, there was miscommunication,
19 whatever the disconnect was, but that's where we have a
20 disconnect is that we thought there was an agreement
21 here. It was on the agreed list that was filed with the
22 Court, I think it was just last week that they said, no,
23 we actually don't have an agreement on these. Despite
24 the fact that, again, these were the subject of -- this
25 evidence was admitted -- at least large portions of

01:55PM

01:55PM

1 these websites were admitted in the Samsung case.

2 THE COURT: All right. Thank you, Mr. Vincent.

3 MR. DAVIS: Your Honor, if I may, I can address
4 that supposed agreement.

01:55PM

5 THE COURT: All right.

6 MR. DAVIS: Okay. So we received Defendants'
7 exhibit list. We objected. Seven different grounds for
8 objections for these JuiceDefender materials. Our
9 May 7th objections, for example.

01:55PM

10 What happened after that, Your Honor, and we
11 appreciated them doing this, but the folks from the
12 T-Mobile/Verizon team sent us a draft of what they
13 deemed a potential joint exhibit list. What they said
14 in their email was this proposed joint exhibit list

01:56PM

15 includes the materials that both sides have on their
16 respective lists and also materials that either side did
17 not object to.

18 In addition -- as it turns out, that was not
19 the case. In addition, the Verizon/T-Mobile team added
20 another handful of documents, including this Exhibit 1.
21 They added some additional documents that apparently
22 they were proposing as joint exhibits, but those had
23 objections associated with them. We never waived any
24 objections.

01:56PM

25 We didn't discover that discrepancy between

1 what they described the proposed joint list being and
2 what it actually was until a little bit later. We, of
3 course, pointed that out to them and said: Consistent
4 with our prior objections, we're not waiving our
5 objections. What you said in your email was this list
6 was only supposed to include things we did not object
7 to.

8 So that's the disconnect. There's no
9 agreement, Your Honor. It was just a miscommunication.
10 You know, maybe we should have checked more closely with
11 what they had put on this proposed joint list, instead
12 of taking at face value their description of how it was
13 created. And so once we discovered that, we told them,
14 cleared it up and said, no, these are still objected to,
15 for the same reasons we've objected to them all along.

16 THE COURT: All right. The documents need
17 authentication. That's what is missing. And they would
18 be nonhearsay if they are authenticated because they are
19 not being offered for the truth; they are being offered
20 to show that they existed before the priority date.
21 Isn't that the case?

22 MR. DAVIS: Not exactly, Your Honor. I think
23 some of them may be being used -- and maybe Mr. Rob can
24 speak to it. Some of them are being used to convey
25 something about timing of JuiceDefender, but I believe

1 they are also relying upon these materials for the
2 substance of JuiceDefender.

3 In other words, there is no additional -- this
4 exhibit is the sum total of everything they have on
01:58PM 5 JuiceDefender. They don't have, for example, another
6 exhibit that is the software itself or some user guide
7 or something like that that's outside of this bucket.

8 THE COURT: Well, in any event, they will
9 require a declaration to satisfy that. At this point
01:58PM 10 I'm going to sustain the objection to the documents in
11 bucket 5, but if they produce a declaration, I'll
12 consider that, if and when.

13 Let's go to the next bucket.

14 MR. DAVIS: So the next bucket, Your Honor, I
01:59PM 15 alluded to a little bit earlier. This is bucket 6, the
16 T-Mobile G1 images and physical exhibit, and there's
17 actually two more exhibits under here which are Android
18 source code.

19 To be clear, we are not disputing that Android
01:59PM 20 source code obtained from Google Android is -- Google
21 Android is a legitimate source for Android source code.
22 We agree with that. The problem is none of this is all
23 linked together.

24 What they have are some screenshots. This is
02:00PM 25 DTX108 in the Verizon case. These are screenshots that

1 were -- or photos that were taken by Samsung's counsel
2 in the 422 case a long time ago of a particular
3 T-Mobile G1 device that they had.

02:00PM

4 No expert, no person, as far as I know,
5 associated with the Defendants has ever handled the
6 physical device. They had no role in the screenshots.
7 They don't know what that physical device was.

02:00PM

8 They have a different T-Mobile G1, same model
9 but not the same physical exhibit, on their exhibit
10 list. That's not what appears in the photographs.
11 There's also no evidence linking the Android source code
12 that they point to to these devices.

02:01PM

13 In other words, they have a physical Android G1
14 device on their exhibit list, but they can't show, you
15 know, by virtue of going to the settings or something
16 like that, here's the version of Android that this
17 device is running. So they are just sort of pulling
18 these disparate sources of information and saying they
19 are all one consistent system. That's essentially the
20 objection there, Your Honor.

02:01PM

21 THE COURT: All right.

22 MR. VINCENT: And just so the record's clear,
23 it's Mr. Vincent that's arguing on behalf of Defendants.

24 MR. DAVIS: Oh, I'm sorry.

02:01PM

25 MR. VINCENT: I'm Rob Vincent, so we sometimes

1 get mixed up. That's perfectly fine.

2 So let me clear another thing up. I think

3 Mr. Davis said there's no one from Defendants who can

4 link these together. That's not true. Ms. Hannah

02:02PM

5 Sifuentes was a witness. She has now testified in three

6 separate legal proceedings on these exact screenshots

7 that are the representative exhibit in this case.

8 She testified in her Samsung deposition. She

9 handled the phone at issue in these screenshots and said

02:02PM

10 and testified that, from her personal experience, she

11 knows what the phone is, knows what the accused --

12 sorry, the accused -- the prior art features look like,

13 and she walked through all those and authenticated them

14 and provided testimony about these screenshots.

02:02PM

15 She testified about these screenshots in the

16 Samsung trial, and she testified about these exact same

17 screenshots that I'm holding in my hand in her

18 deposition in this case. She said under oath: I know

19 what these are; I know where they came from; I am

02:02PM

20 familiar based on my experience with this Android

21 system, this Android prior art system.

22 That's the testimony. And she's prepared to

23 say those things -- just as she said in the Samsung

24 case, she's prepared to say those exact same things at

02:03PM

25 this trial.

1 I believe the -- if I understand the objection
2 is because there is, on our physical exhibit list, a
3 different physical unit. Again, our prior art
4 invalidity theory is not that a -- my specific phone
02:03PM 5 renders obvious the claims. It is this model of phone,
6 or the model of phones running Android 1.6 renders
7 obvious the claims. And we have evidence from several
8 witnesses. Ms. Sifuentes, our experts. We have Google
9 witnesses that testified about Android 1.6 and
02:03PM 10 authenticated that.

11 And the linkage is there, Your Honor, to link
12 phones that were sold, including the G1, including the
13 myTouch with Android 1.6, and we have the source code of
14 Android 1.6 to describe exactly how it worked. We have
02:04PM 15 the screenshots from the phone to show how it worked.
16 So all of these are linked through several witnesses.

17 THE COURT: All right. Thank you, Mr. Vincent.

18 MR. DAVIS: Your Honor, another thing I would
19 add on this is that Ms. Sifuentes is a T-Mobile
02:04PM 20 employee. She indeed testified in the Samsung case and
21 testified in the T-Mobile case. She's not testified in
22 a Verizon case. I don't know if -- what Mr. Vincent's
23 referring to exactly that Ms. Sifuentes is -- her
24 testimony is applicable to the Verizon case. So maybe
02:04PM 25 there's different treatment that this requires here, but

1 I'm very familiar with Ms. Sifuentes.

2 What happened was that Samsung's counsel took
3 these screenshots, showed her screenshots. She

4 recalled, having been at T-Mobile for quite some time,

02:05PM

5 that ten years prior, she had used a T-Mobile G1 device

6 and that the screenshots were generally consistent with

7 her recollection. She handled the physical device that

8 Samsung's counsel had, had brought to the deposition,

9 and I'm not aware of -- I can be corrected on it

02:05PM

10 certainly, but I'm not aware of Ms. Sifuentes testifying
11 in a Verizon case, though.

12 MR. VINCENT: I can pull that up, Your Honor,
13 if I could.

14 THE COURT: All right.

02:05PM

15 MR. VINCENT: Verizon issued a notice of
16 subpoena to Ms. Sifuentes. In this case she was
17 deposed, and she was asked questions on behalf of
18 Verizon on this exact issue. This was an exhibit to her
19 deposition noticed by Verizon in which these were

02:05PM

20 discussed.

21 So she was noticed by Headwater in the T-Mobile
22 case, and simultaneously with that deposition, she was
23 also noticed by Verizon, also AT&T, but she was noticed
24 by other parties, not just T-Mobile. So she testified
25 in all the carrier cases, and part of that testimony

02:06PM

1 relates exactly to these screenshots and other exhibits.

2 THE COURT: All right. I'll overrule the
3 objections to bucket 6, and that takes us to bucket 8.

4 MR. HOFFMAN: Your Honor, bucket 8 only relates
02:06PM 5 to T-Mobile and the likely earlier bucket involving only
6 T-Mobile. It's closely related to a motion in limine
7 for T-Mobile that's to be argued, so we would argue that
8 we should address the motion in limine first.

9 THE COURT: All right. That leaves us with
02:06PM 10 bucket 9.

11 MR. DAVIS: Bucket 9, Your Honor, is specific
12 to the Verizon case. It's only one exhibit, DTX96.
13 This is a Verizon patent that what Verizon says it's
14 relevant to supporting apportionment arguments, I
02:07PM 15 believe. The problem we see is that this is going to be
16 confusing to the jury.

17 This is a -- it's a Verizon patent that refers
18 to PC0 values, and the problem here, Your Honor, is that
19 the -- it's a -- Headwater's infringement read for the
02:08PM 20 '042 patent, which I understand your Honor has ruled on
21 but also for at least one dependent claim of surviving
22 patents makes reference to PC0 values.

23 And so the confusion here, I think, Your Honor,
24 is that a juror may be misled into thinking that, well,
02:08PM 25 Verizon has this patent that talks about PC0 and that's

1 accused; so, therefore, the patent office giving them a
2 patent discussing that must mean they have an ability to
3 practice that and not infringe Headwater's patent.

4 So that, I think, is the confusion.

02:08PM

5 THE COURT: This is not a patent that Verizon's
6 relying on for invalidity?

7 MR. DAVIS: No, Your Honor.

8 THE COURT: All right. Thank you, Mr. Davis.

02:09PM

9 MR. ROBB: Your Honor, the patent at issue is
10 primarily related to the '042 disputes, which are
11 largely resolved by Your Honor's ruling. We can address
12 that issue in more detail.

02:09PM

13 The one lingering issue to the extent, assuming
14 Your Honor's ruling on the '042 sticks, is that they
15 are -- there's an issue that I believe one of my
16 colleagues will discuss relating to allegations about
17 Thomas Russell and the connection between what Verizon
18 was doing with its own internal development, *vis-a-vis*
19 the asserted patents and the device-side technologies.

02:09PM

20 THE COURT: Well, if you're arguing that it has
21 some relevance, that's fine. But the problem is under
22 Rule 403, I just don't believe that it's improper to
23 admit exhibits patents that look confusingly similar to
24 the patents that you are relying on for invalidity. And
02:10PM 25 so you can have your expert talk about it, but it will

1 not be admitted as an exhibit.

2 MR. ROBB: Your Honor, can I just clarify
3 something?

4 THE COURT: You can.

02:10PM

5 MR. ROBB: We don't have any prior art that
6 looks like the patent at issue in this bucket. The
7 reason this patent is being proffered as an exhibit is
8 it goes to apportionment. There's no dispute that it
9 comes after the priority date. Their expert essentially
10 compared the value of the accused feature and attributed
11 all of that to the asserted patent.

02:10PM

12 THE COURT: You don't have patents that you are
13 relying on as prior art for invalidity?

14 MR. ROBB: Specific to the PCO technologies
15 that --

02:11PM

16 THE COURT: I'm just talking about patents.

17 MR. ROBB: Your Honor, I'm actually somewhat
18 embarrassed. I'm the member of my team who knows the
19 least about our device side.

02:11PM

20 Yes, we do.

21 THE COURT: I saw a bunch of them on the
22 listing there. That's the problem. If this patent is
23 allowed to come in as an exhibit and the jury remembers,
24 well, the Plaintiffs didn't say anything about why that
25 patent doesn't invalidate, it must invalidate.

02:11PM

1 And so the Plaintiff's left in the position of
2 either spending the time to point out what's missing
3 from that or explain it and hope the jury remembers that
4 that's not being offered for invalidity, or just taking
02:11PM 5 the risk. And, frankly, it has very little probative
6 value that, as an exhibit, I mean, your expert can
7 certainly talk about what he sees in it that he's
8 relying on. But that's the basis for the Court's policy
9 of not having unelected patents be admitted as exhibits.

02:12PM 10 MR. ROBB: Yes, Your Honor. Thank you.

11 THE COURT: I'll sustain the objection to DX96.

12 All right. There are a couple of exhibits that
13 we have not addressed, but what I want to make sure we
14 do is to get final exhibit lists that address all the
02:12PM 15 exhibits that have either been agreed as admissible or
16 have been ruled to be admissible.

17 And one thing I want to point out is I think
18 it's important that you keep the same exhibit numbers
19 that we've been using, even though there's large gaps in
02:13PM 20 them. The record's impossible to follow if you change
21 up the exhibit numbers after this hearing.

22 So what I'll do is ask counsel to review their
23 lists and submit to each other by, say, Tuesday of next
24 week what each side believes to be their own final
02:13PM 25 exhibit list of preadmitted exhibits and then confer

1 about them if you have any disputes and file them into
2 the record as final exhibit lists by Friday of next week
3 and then we'll try and give you a date.

02:14PM 4 And I know we've got more to go today, but
5 before we leave here, we'll try and give you a date
6 where we'll take up any disputes that the parties cannot
7 agree on the way we've handled them and take up any
8 redactions that the parties may disagree about.

02:14PM 9 Is there any clarification of that that either
10 side needs?

11 MS. FAIR: Not from the Plaintiff, Your Honor.

12 MR. DACUS: Not from us, either, Your Honor.

02:14PM 13 THE COURT: All right. Then let me see. What
14 else do we need to take up in the Verizon matter before
15 we go back to T-Mobile matter?

16 There was an objection that was talked about at
17 last week's pretrial conference concerning certain
18 Verizon witnesses. I think they were largely deposition
19 issues. Have those been resolved by the Plaintiff?

02:15PM 20 MR. DACUS: Are these the first-day designation
21 issues, Your Honor, or something different?

02:15PM 22 THE COURT: I recall that when we were going
23 over the agenda, the Plaintiff indicated that they had
24 objections that they wanted the Court to take up. The
25 use of deposition testimony of Verizon witnesses, and it

1 sounds like that's no longer a major thing.

2 MR. HOFFMAN: Your Honor, I think the issue was
3 there were several witnesses, and unfortunately I don't
4 remember who they were, but they were late disclosed and
02:16PM 5 that was our objection. And Defendants responded that
6 they probably were all appearing by deposition, I
7 believe, and that would resolve the issue of the
8 specific objection there.

9 And I don't know if that, in fact, ultimately
02:16PM 10 was the case. We can look back at the transcript and
11 find the list, and if we can confirm that they are
12 appearing -- not appearing live, I think that resolves
13 the issue.

14 THE COURT: I take it then that at the moment,
02:16PM 15 there's no issue there for me to take up?

16 MR. HOFFMAN: I think we need to clarify it,
17 yes, Your Honor, before we could. There may -- it may
18 have been resolved.

19 THE COURT: All right.

02:16PM 20 While you're up there, Mr. Hoffman, are there
21 any depositions with objections that you intend to offer
22 as evidence on the first day?

23 MR. HOFFMAN: There are, Your Honor.

24 THE COURT: Which ones?

02:17PM 25 MR. DAVIS: Yes, Your Honor. We have

1 identified some first-day deposition designations. The
2 parties have conferred and managed to narrow that a bit.
3 Headwater identified eight potential witnesses as
4 first-day deposition plays. For two of those witnesses
02:17PM 5 so far, the parties have agreed to drop one another's
6 objections to their respective designations. Those
7 witnesses are Mr. Chan of third-party Apple and
8 Mr. Venkatraman of third-party Apple. We do have
9 some --

02:18PM 10 THE COURT: What was the second Apple witness's
11 name?

12 MR. DAVIS: Oh, yes. It's Venkatraman,
13 V-e-n-k-a-t-r-a-m-a-n.

14 THE COURT: All right. And you're saying those
02:18PM 15 two are now without objections?

16 MR. DAVIS: That's right, Your Honor.

17 THE COURT: And you said there are eight?

18 MR. DAVIS: There were eight total identified,
19 that's right. So I'll show on screen a little bit how
02:18PM 20 we --

21 THE COURT: You're going to start your trial
22 with eight depositions?

23 MR. DAVIS: I know. It's -- I think as
24 Mr. Fenster alluded to, this is a bit of a challenging
02:18PM 25 cases in that there are party witnesses and third-party

1 OEM witnesses that make it a real challenge, but
2 certainly take a point that the odds of us actually
3 being able to play eight is highly low -- is very, very
4 low.

02:19PM

5 So there's another witness, Mr. Russell.
6 There's an outstanding MIL, no longer an outstanding
7 MSJ, but we do think that could impact the designations
8 as well. So it probably makes sense to not go line by
9 line through Mr. Russell's designations.

02:19PM

10 There's another witness, a Verizon witness,
11 Mr. Umamaheswaran. The parties -- Headwater provided
12 some designations and asked for Verizon to provide
13 narrowed counterdesignations. Both parties have
14 designated quite a lot of his testimony.

02:19PM

15 We haven't yet received the narrowed
16 counterdesignations, I don't believe, but we think it
17 makes sense to talk about the other four witnesses at
18 least at this point. And the parties have done, I
19 think, a good job of narrowing to a small number of
20 objections that you'll see here on Slide 19.

02:20PM

21 If it would be helpful to Your Honor, we have a
22 binder for you that has the deposition transcripts, if
23 you'd like to page through as we go.

24 THE COURT: All right.

02:20PM

25 MR. DAVIS: And I believe, Your Honor, the tabs

1 should be in order of how we'll discuss these witnesses,
2 beginning with the Sharkey trial testimony.

3 So for context, Your Honor, Mr. Sharkey
4 testified in the 422 case. Headwater's remaining
02:21PM 5 objections are targeted at two particular issues.

6 The first issue, Your Honor, is that
7 Mr. Sharkey had some particular testimony about plain
8 language that was at issue in the 422 case but is not at
9 issue here and so this goes along the lines of
02:21PM 10 Headwater's MIL 3 that you ruled upon. It's essentially
11 the same issue.

12 If we -- in the 422 case, the relevant claim
13 language recited interacting in the device display
14 foreground, and here the relevant claim language is
02:21PM 15 interacting with the user in a user interface
16 foreground. There's no display cited, and notably
17 Samsung's noninfringement argument at trial was tied to
18 that display limitation.

19 So what we see in -- at 496:25, as a first
02:22PM 20 example, Your Honor -- I'll give you a few of them so
21 that you can get a sense of this. At Page 496, Line 25,
22 we see the quote -- I believe it's in the question --
23 "interaction in the display."

24 The same quotation we see on Page 497, Line 6.
02:22PM 25 The same quotation we see on Page 498, Line 19.

1 Similarly at Page 498, Lines 24 to 25, we see, quote,
2 "screen turns off." That's again tied to the display
3 limitation in that 422 case.

4 THE COURT: Where is that now?

02:23PM

5 MR. DAVIS: Oh, yes. I'm sorry. That's at
6 498, lines 24 to 25.

7 THE COURT: All right.

02:23PM

8 MR. DAVIS: We see at Page 501, Lines 13
9 through 14, there is, quote "interacting in the device
10 display foreground," and we see that same language at
11 Page 501, Lines 22 to 23.

02:23PM

12 And so, you know, I think for the same reasons
13 we discussed with respect to MIL 3, we think it's
14 improper to have testimony be introduced where it was
15 focused especially on the claim language that was at
16 issue in the 422 case, that's not at issue here.

02:24PM

17 THE COURT: So the designation that the
18 Defendant wants to use regarding, let's start with Pages
19 496 and 97. Where -- what portion are they seeking to
20 use?

21 MR. DAVIS: They are seeking to use 496 through
22 497:8 -- oh, I'm sorry. I think I missed a line number.
23 They are seeking to use 496, Line 16 through 497, Line
24 8.

02:24PM

25 THE COURT: All right. Let's just focus on

1 that, and your argument is that the phrase there
2 "interaction in the display" in the questions is a
3 reference to a limitation that's not present in the
4 asserted claims?

02:25PM 5 MR. DAVIS: That's exactly right, Your Honor.

6 THE COURT: All right. Then let me hear from
7 the Defendant on that.

8 MR. DAVIS: If you don't mind, I'll just leave
9 this up for reference. I don't know if you mind.

02:25PM 10 MR. VINCENT: I don't mind.

11 MR. DAVIS: Okay.

12 MR. VINCENT: So, Your Honor, I had a lovely
13 printout with a highlight that I cannot seem to locate,
14 but what Mr. Sharkey was asked in that testimony and
02:25PM 15 explicitly testified -- and if I can get the cite, I
16 will provide it to Your Honor -- he was explicitly
17 asked: Are we talking about any patents here?

18 He said no. There is no evidence that
19 Mr. Sharkey ever saw the patent at issue in the Samsung
02:25PM 20 case. He certainly wasn't asked questions about claim
21 language about that patent. He was opining about the
22 functionality of the accused features, the same
23 functionality and same accused features that are accused
24 in this case. That is what Mr. Sharkey's testimony goes
02:26PM 25 to.

1 Just because there is overlap in language
2 doesn't mean that it goes to one patent and not another.
3 Like, for example, Headwater is designating testimony
4 from Mr. Sharkey about background, how Android handles
02:26PM 5 background data. It was relevant to that case; it's
6 also relevant to this case. It doesn't mean it was
7 about a specific patent. It's about the functionality
8 of Android.

9 That's what Mr. Sharkey was testifying about.
02:26PM 10 He explicitly said in his testimony "I'm not talking
11 about any patents. I'm talking about the functionality
12 of Android." All of his testimony is about the
13 functionality of Android, not -- he wasn't asked any
14 questions about claim language.

02:26PM 15 THE COURT: All right. Thank you, Mr. Vincent.

16 MR. DAVIS: So, Your Honor, I think this is
17 squarely within the ruling on MIL 3. Mr. Vincent
18 pointed to --

19 THE COURT: Mr. Davis, the intent of the ruling
02:27PM 20 on MIL 3 was that if prior testimony was dealing
21 expressly with a limitation that was asserted in that
22 case and is not asserted in this case, then the
23 testimony would not be admissible. How is this
24 testimony talking about a claim limitation?

02:27PM 25 MR. DAVIS: Because this is not a coincidence

1 that Samsung's counsel used the language "interaction in
2 the display" and "interaction in the device display
3 foreground." That is explicitly the language from the
4 '976 patent in the 422 case. That language is not at
5 issue here.

02:27PM

6 The reason Samsung was asking the questions
7 with that language was because their noninfringement
8 argument was based on there being no interaction in the
9 display.

02:28PM

10 Mr. Sharkey, can -- they can have elicited the
11 self-serving testimony that Mr. Sharkey didn't look at
12 the patent or what have you, but the reason that
13 question was asked with the words "display" in it was
14 because that was a claim limitation there and it's not
15 here, unlike what Mr. Vincent said a moment ago where he
16 said, "Well, we designated language about background."

02:28PM

17 Well, the difference is, Your Honor, the word
18 "background" was in the claims in that prior case, but
19 it's also in the claims in this case. That's the
20 difference. We don't think it's appropriate for someone
21 who was testifying about claim language that is
22 different from what is here to be admitted.

02:28PM

23 THE COURT: Is your argument that Mr. Sharkey
24 was talking about a particular claim limitation in this
25 testimony?

02:29PM

1 MR. DAVIS: Yes.

2 THE COURT: And do you disagree with the
3 statement that Mr. Vincent made that Mr. Sharkey
4 indicated in his deposition that he was not talking
02:29PM 5 about the claims?

6 MR. DAVIS: I do, Your Honor. I don't think it
7 could possibly be a coincidence that there are questions
8 after questions after questions that have "device
9 display foreground," display, display, display in it and
02:29PM 10 that was the claim limitation in that case.

11 THE COURT: Well, I'm not really concerned what
12 the motivation of the lawyer's question was. I'm
13 concerned with whether the jury would be getting a
14 misrepresentation of the witness's testimony.

02:29PM 15 So my concern is not what the lawyer asking the
16 question was after but whether the witness was talking
17 only about or expressly about a claim limitation that
18 this jury will never hear about.

19 MR. DAVIS: I understand, Your Honor, yes. And
02:30PM 20 to that concern, the issue is if Mr. Sharkey said, no,
21 the Android functionality did not detect interaction in
22 the display, that sounds very similar. There's
23 overlapping language like the word "interact" with the
24 claim language at issue here.

02:30PM 25 And so what Defendants are -- what the jury is

1 going to conclude from that potentially, Your Honor, is
2 that, well, Mr. Sharkey, he's the authoritative source
3 from Google. He said no interacting, and the claim
4 limitation here says interacting; therefore, there's no
5 interacting.

02:30PM

6 But he didn't say there's no interacting at
7 all, and he didn't say there's no interacting in the
8 user interface foreground, the actual terminology here.
9 He said there's no interacting in the device display
10 foreground, which is different.

02:31PM

11 And so that's the confusing part for the jury,
12 Your Honor. And unfortunately we don't have any reason
13 to believe that Mr. Sharkey will be there at trial live,
14 so he can't clear it up during his testimony, either.

02:31PM

15 THE COURT: Well, this is a deposition that
16 you're offering.

17 MR. DAVIS: Yes, this was his trial testimony.
18 I think both sides have designated from his deposition.

02:31PM

19 THE COURT: I understand that, but you know
20 he's not going to be there. You're offering his prior
21 testimony.

22 MR. DAVIS: Yes.

23 THE COURT: So how is it that you didn't expect
24 to be stuck with his prior testimony?

02:31PM

25 MR. DAVIS: Well, I think, Your Honor, it's

1 just the simple fact that much of his prior testimony is
2 relevant to the issues here, but we were very specific
3 in what we identified as our remaining objections. Only
4 the portions where he's specifically saying "device
5 display foreground" or "display."

02:32PM

6 THE COURT: Well, what I'm concerned about and
7 what the MIL was going after is an effort to portray his
8 testimony as something it wasn't, and this does not
9 appear to me to be that. He's not being asked about
10 some specific term that's going to be greatly at issue
11 to the jury and -- or would be.

02:32PM

12 MR. DAVIS: I think the issue is that it's
13 confusingly similar to a jury, that it's talking about
14 interacting and interacting with the user. And that has
15 some overlap in language with claim terms at issue here.

02:33PM

16 THE COURT: Well, isn't it relevant?

17 MR. DAVIS: No, I don't believe so, Your Honor.
18 As just one example, I think there is testimony from
19 various sources that a display is a subset of a user
20 interface. For example, user interface could include a
21 speaker, something like that.

02:33PM

22 And so if Mr. Sharkey is saying there's no
23 interacting in the device display, that does not mean
24 that even he believes that there is no interacting in
25 the device user interface foreground because that could

02:33PM

1 be broader.

2 THE COURT: Yeah. I understand that, but it's
3 not -- it doesn't make it irrelevant. It's less likely
4 that there's interaction in the device display
02:34PM 5 foreground if there's no interaction in the device
6 display.

7 MR. DAVIS: I see your point is if it's a
8 subset, then that is one possibility within the subset
9 and so, therefore, it's relevant. I think the problem
02:34PM 10 is it's unfairly prejudicial and that outweighs the
11 potential relevance that it might have. Because the
12 jury may draw these improper conclusions that he was
13 actually testifying about the claim language at issue
14 here because it is similar in some respects.

02:34PM 15 The jury is not going to be told, "Well,
16 Mr. Sharkey, just for context, he was testifying in
17 another lawsuit that involved a different patent." And
18 so they would assume he's testifying about the subject
19 matter of this case.

02:34PM 20 THE COURT: I'd be more sympathetic to your
21 objection if you were not the one calling the witness.

22 MR. DAVIS: We're not the only one calling the
23 witness, and these are not -- Mr. Sharkey is their prior
24 art witness as well, Your Honor. So I assume that
02:35PM 25 Defendants are not going to sit here today and say that

1 they would agree not to call Mr. Sharkey.

2 THE COURT: You took his deposition also?

3 MR. DAVIS: We did, Your Honor. Yes, there's
4 questioning from -- in the Sharkey deposition, there's
02:35PM 5 questioning from Samsung's lawyers and Headwater's
6 lawyers.

7 THE COURT: So I assume in that deposition, the
8 parties only addressed the relevant claim terms?

9 MR. DAVIS: Yes. Yes, I think that's right,
02:35PM 10 Your Honor. I don't know if you had something in mind
11 beyond the relevant claims, but --

12 THE COURT: My question is why are you using
13 the trial testimony if it didn't deal with the relevant
14 features?

02:36PM 15 MR. DAVIS: Oh. Well, because Mr. Sharkey's
16 testimony was not solely about things like interacting
17 in the display. He testified about other aspects as
18 well, including subject matter that overlaps with what's
19 at issue here. As just one example, Your Honor,
02:36PM 20 something like blocking, that was at issue in both
21 cases.

22 THE COURT: Well, let me hear from Mr. Vincent
23 as to what the relevance of the answer to this question
24 is that we're talking about here that asks whether there
02:36PM 25 is user interaction in the display. How is that

1 relevant to the issues in this case?

2 MR. VINCENT: Your Honor, the specific
3 question, if I understand, how the specific question and
4 answer, the question to Mr. Sharkey about the
02:37PM 5 functionality of Android and interaction in the device
6 display foreground?

7 THE COURT: Well, the two questions that I'm
8 looking at, both ask about whether there's user
9 interaction in the display.

02:37PM 10 MR. VINCENT: Your Honor, that's directly
11 relevant to our -- one of our fundamental
12 noninfringement defenses that we have moved for summary
13 judgment on. Counsel wants to parse whether a user
14 interface is a broader term than "display."

02:37PM 15 Our experts have been -- have testified that in
16 the context of these patents, that is the display.
17 Mr. Sharkey, though, was not testifying about any claim
18 terms, and I have that testimony finally.

19 If I could have the ELM0, please.

02:38PM 20 This is at the -- at the top, this is his trial
21 testimony. Line 2: "You have not been asked to look at
22 the patent or compare the patent -- the claim to either
23 the accused products or the prior art. Correct?"

24 "I have not been asked to do that."

02:38PM 25 "And you have rendered no opinions and have no

1 opinions as -- on those subjects. Correct?"

2 "That's correct."

3 Mr. Sharkey -- Headwater's counsel said the
4 jury might think that Mr. Sharkey's talking about the
02:38PM 5 functionality of the accused feature. That's exactly
6 what he's talking about. If they want to cross our
7 expert and say that, "Well, you know, he said 'device'
8 and that's not 'user interface,'" they can do that.

9 But Mr. Sharkey wasn't opining about any claim
02:38PM 10 term of any patent. He was giving testimony about the
11 functionality of the accused features, the exact same
12 accused features as are present here, and he was
13 using -- he was on this very issue.

14 There is a limitation in the '613 patent
02:39PM 15 whether there is interaction with the user and the user
16 interface, device user interface foreground. That is --
17 his testimony is directly relevant to that point.

18 Whether it's dispositive, whether it is
19 conclusive, it is definitely probative of that issue, of
02:39PM 20 the functionality and how these accused features
21 operate.

22 And Headwater can cross our experts. They can
23 explain why they don't think that matters. It's
24 definitely relevant. And as Your Honor put it, it
02:39PM 25 definitely makes it more probative, more likely than not

1 that -- and the Android features do not interact with
2 the user in the user interface foreground.

3 THE COURT: All right. Thank you, Mr. Vincent.

4 Mr. Davis, I agree with Mr. Vincent in this

02:39PM

5 case. I know what the intent of MIL 3 was, and this is
6 not it. If you have other examples, feel free to go
7 there.

8 MR. DAVIS: So no further examples on this
9 point, Your Honor. I think as I started, I mentioned
10 that we have two issues with respect to the Sharkey
11 trial designations.

02:40PM

12 THE COURT: All right.

13 MR. DAVIS: Separately, we have an objection
14 that we wanted to preserve for the record to the
15 designations, any designations from 507:20 through
16 510:18, 520:12 through 19, or 525:1 through 12.

02:40PM

17 The objection there is a different issue,
18 specifically that Mr. Sharkey was testifying about the
19 operation of certain first-party Google applications
20 like Gmail, and he had no personal knowledge to support
21 that testimony.

02:40PM

22 This issue, Your Honor, was something that was
23 discussed extensively with you in the 422 case, so I
24 think we understand your view on that and so I'm just
25 preserving that objection for the record. We understand

02:41PM

1 the ruling there, and I think it is applicable here as
2 well.

3 THE COURT: I remember it like it was
4 yesterday.

02:41PM

5 MR. DAVIS: Better than me, I'm sure you do,
6 actually.

7 And so with that, I think that addresses the
8 issues with the Sharkey trial testimony. The Sharkey
9 deposition testimony, this one's a little bit different.

02:41PM

10 These ones are actually Defendants' objections to our
11 designations, I believe. So I should probably yield the
12 floor.

13 THE COURT: All right.

14 MR. SIM: Good afternoon, Your Honor. Charlie
15 Sim for the Defendants.

02:42PM

16 This should be relatively straightforward. So
17 for Mr. Sharkey's deposition designations, the parties
18 have gotten together and dropped almost all of the
19 objections mutually. This is the only one that remains.

02:42PM

20 It is three sections of testimony. I'm happy to read
21 them in the record if you would like. They are all
22 directed to a brief line of questioning where
23 Mr. Sharkey was asked about a patent on which he is an
24 inventor. That patent is not asserted in this case. It
25 is not and cannot be prior art to the two remaining

02:42PM

1 patents in this case, and as such, we think that there
2 is a substantial enough risk of jury confusion by
3 introduction of questioning on an essentially irrelevant
4 patent -- they are not relevant to any issue in this
5 case -- that these discrete sections of testimony should
6 be excluded on that basis.

7 THE COURT: What's the page and line?

8 MR. SIM: So the three designations will be 125
9 from 17 to 24, 129:14 to 23, and 135 from 7 to 17 in
10 Mr. Sharkey's deposition from the Samsung 422 case.

11 THE COURT: And I guess, frankly, it would be
12 helpful if I hear from the Plaintiff about what they
13 intend is the purpose of this testimony. I'll give you
14 a chance to respond.

15 MR. DAVIS: Yes, Your Honor.

16 So Mr. Sharkey, he's testifying about his own
17 patent. These are his own words from his own patent.
18 Mr. Sharkey, it's -- he's being used to support
19 Defendants' prior art case. He's their primary lead
20 prior art witness on invalidity. These statements in
21 his patent, which are his words as the prior art
22 witness, discuss the state of the art as of the time of
23 his patent, which came after Headwater's. And so
24 he's --

25 THE COURT: Where is that testimony?

1 MR. DAVIS: Yes. So we can find that on Page
2 125:17 through 24.

3 THE COURT: I don't see --

4 MR. DAVIS: That's just introducing the patent.

02:45PM

5 THE COURT: Yeah. Where is the language that
6 you think is relevant?

02:45PM

7 MR. DAVIS: Oh, yes. So 129, the designation
8 of 14 through 23 says that, you know, as of the time of
9 his patent, current computing devices do not provide
10 fine-grained visibility and control of network usage
11 patterns on individuals' computing devices where the
12 network data flows originate.

02:45PM

13 And he says in the next designation, which
14 occurs on Page 135:7 through 17, that there is a need
15 for determining, controlling, adapting, reporting data
16 usage for specific applications and features of
17 applications that are running on devices and exchanging
18 data with networks.

02:46PM

19 And so our point there, Your Honor, is just
20 that Mr. Sharkey is suggesting that there is this need
21 that exists as of the time of his patent that seems to
22 be in tension in our view with their view on invalidity.

02:46PM

23 THE COURT: All right, Mr. Davis. I understand
24 that position. I don't think that the jury is going to
25 be confused by that use of the patent, and it seems to

1 me to be within the broad understanding of relevance.
2 So I'm going to overrule those objections to
3 Mr. Sharkey's deposition.

4 MR. DAVIS: Thank Your Honor.

02:46PM

5 And I believe the next one also will begin with
6 Defendants.

02:47PM

7 THE COURT: All right. Well, I have -- I've
8 gone beyond when I should have taken the afternoon
9 recess for the court reporter, so I apologize to her,
10 and we'll take a 15-minute recess.

11 (Recess from 2:47 p.m. to 3:03 p.m.)

12 THE COURT: Let's move on to the next
13 deposition or prior testimony issue.

14 MS. BEDARD: Good afternoon, Your Honor.

03:03PM

15 THE COURT: Hello, Ms. Bedard.

16 MS. BEDARD: I'm going to address the
17 Defendants' remaining objections to the deposition
18 designations of the Samsung Electronics America witness
19 named Michael Schiksnis. I apologize for my
20 pronunciation there.

03:04PM

21 As we've done for several of the other
22 witnesses that we're discussing today, the parties were
23 able to negotiate down to just a few remaining
24 objections. So we have two remaining designations in
25 Defendants' objections that I will discuss today. And

03:04PM

1 they are separate topics, so I'll just address them one
2 after the other.

3 The first one is a designation to Page 84,
4 Line 22 to Page 85, Line 4. And the line of questioning
03:04PM 5 here is a question by Plaintiff's counsel to Samsung's
6 corporate witness that asks: Are you familiar with the
7 term [REDACTED]?

8 And the witness answers: Yes.

9 Plaintiff's counsel asks: What is that?

03:05PM

10 And the witness answers: [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 Defendants' objections here are primarily for
14 the reason of prejudice. Introducing testimony from a
03:05PM 15 Samsung witness on the issue of [REDACTED]
16 would do nothing but prejudice Defendants. The Samsung
17 employee's understanding of what the term means has no
18 relevance here. And the later testimony from the
19 witness, as you can see from Line 5 to Line 25 on
03:05PM 20 Page 85, states that the witness has never

21 [REDACTED] something.

22 When asked, "[REDACTED]
23 [REDACTED], " he says, "[REDACTED] . "

24 "[REDACTED]

03:06PM

25 [REDACTED] ? "

1 " [REDACTED] ."

2 " [REDACTED]

3 [REDACTED] ?"

4 " [REDACTED] ."

03:06PM

5 " [REDACTED]

6 [REDACTED] ?"

7 Answer: " [REDACTED] ."

8 And so the lines that are designated by

9 Headwater would do nothing but prejudice Defendants in

03:06PM

10 this case. There's no legitimate purpose to introduce

11 this to the jury except to confuse them and incite them

12 with testimony from a corporate representative of one of

13 the OEMs at issue in this case.

14 THE COURT: All right.

03:06PM

15 MS. BEDARD: And would you like me to address

16 the second, or have Headwater's counsel address this and

17 then stand back up?

18 THE COURT: Go ahead and tell me about the

19 second.

03:06PM

20 MS. BEDARD: Sure.

21 So the second set of testimony that we are

22 objecting to is on Page 91. It starts at Line 17 and

23 goes through Page 92 at Line 8, and the questions and

24 answers here relate to whether a video is, quote,

03:07PM

25 interacting with a user in the foreground.

1 Headwater's counsel's questions here directly
2 track the language of the asserted claims in the '613
3 patent. Mr. Schiksnis is a third-party corporate
4 witness. He's not an expert witness in this case. He
03:07PM 5 has no qualifications to provide a technical opinion to
6 the claim terms in this case and whether some activity
7 meets those claim limitations and so his testimony, he
8 doesn't have the personal knowledge to testify to this
9 issue.

03:07PM 10 And then it would be unduly prejudicial to the
11 Defendants to allow, again, a Samsung corporate witness
12 to testify whether or not he believes, based on no
13 expertise, whether a claim limitation is met.

14 THE COURT: All right.

03:08PM 15 MS. BEDARD: Thank you, Your Honor.

16 THE COURT: Thank you, Ms. Bedard.

17 MR. DAVIS: Your Honor, so going back to the
18 first disputed designation, the issue there is just this
19 is the witness, who is a Samsung engineer, experienced,
03:08PM 20 and the POSITA, for that matter, a senior director of
21 engineering at Samsung, with an electrical engineering
22 background. He's worked for ten years at Samsung and
23 worked as an engineer at Motorola before that, and he's
24 just providing his understanding of the term "[REDACTED]

03:08PM 25 [REDACTED]."

1 THE COURT: Is there evidence that you will be
2 presenting that Samsung [REDACTED]?

3 MR. DAVIS: Yes. So there's -- there is
4 evidence of [REDACTED]. So in -- for example,
03:09PM 5 there's Mr. de la Iglesia, our validity expert, has live
6 opinions on secondary considerations of long-felt need,
7 failures of others, and copying that explicitly refer to

8 [REDACTED]
9 [REDACTED]
03:09PM 10 [REDACTED]. That's found in
11 Paragraphs 455 and 464 of his validity report. He
12 refers to [REDACTED]
13 [REDACTED] and
14 so that's -- that's really the relationship there, Your
03:09PM 15 Honor.

16 THE COURT: And are you saying that Mr. de la
17 Iglesia represents that there was [REDACTED] by
18 Samsung?

19 MR. DAVIS: Yes, that there's [REDACTED]
03:10PM 20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED].

24 THE COURT: I know that there's a MIL against
03:10PM 25 any argument that Verizon reverse engineered anything.

1 MR. DAVIS: That's right, Your Honor.

2 THE COURT: And you're steering clear of that
3 in these questions?

4 MR. DAVIS: Yes, Your Honor.

03:10PM

5 So, yes, I am glad you clarified. So there are

6

7 [REDACTED] what you just referred
8 to, the assertion of reverse engineering by Verizon, and
9 as of the last pretrial conference -- and this was part
10 of one of the MILs that we agreed to -- we would not
11 refer to the whistleblower complaint or allegations of
12 reverse engineering by Verizon.

03:11PM

13 THE COURT: All right. And on this second
14 issue, why isn't this an opinion that you're asking for
15 about whether something constitutes that particular
16 claim limitation?

03:11PM

17 MR. DAVIS: Yes. So, Your Honor, this is,
18 again, a person of ordinary skill in the art who is
19 being asked a sort of hypothetical scenario, and he
20 explains what he believes interacting with the user in
21 the foreground. He sort of responds to the
22 hypothetical. And so it's at least evidence of what
23 this claim term means to one of ordinary skill in the
24 art.

03:11PM

03:12PM

25 I think, Your Honor, especially with the

1 rulings on, for example, the Sharkey testimony that, you
2 know, also relates to, you know, claim language or
3 something akin to claim language, we don't see why there
4 would be a distinction here to say this is not okay for
5 the Samsung witness to be saying this but is okay for
6 Defendants to introduce about Mr. Sharkey.

7 THE COURT: Mr. Sharkey's questions were not
8 claim language. Your question -- your objection was
9 that that was not the claim limitation.

10 MR. DAVIS: I can clarify that too, Your Honor.
11 So there are other questions that Mr. Sharkey fielded
12 that would get at claim language that is relevant to
13 this case, even in our view. Those were not subject to
14 objections.

15 Now, what Defendants objected to -- or, I'm
16 sorry. What we objected to was Defendants identifying
17 Sharkey testimony about claim language that was only at
18 issue in the 422 case. This is different testimony here
19 for Mr. Schiksnis because, intentional, Your Honor, we
20 do not ask him about the display. We ask him about the
21 interacting with the user in the foreground. That
22 tracks the claim language at issue here.

23 And so I guess all my point was, Your Honor, is
24 that if we're going to permit Mr. Sharkey's testimony
25 about overlapping claim language between the two cases

1 and we're going to permit Mr. Sharkey's testimony about
2 claim language that was only at issue in the 422 case
3 like "display," then certainly it should be permissible
4 for Mr. Schiksnis's testimony about claim language that
5 is at issue here.

03:14PM

6 THE COURT: You don't dispute that you're
7 asking him for an opinion?

8 MR. DAVIS: I'm asking him about a hypothetical
9 that I'll certainly admit, Your Honor, that I am using
10 claim language in the questioning. This was one of my
11 depositions, and I say "interacting with the user in the
12 foreground."

03:14PM

13 I think like Samsung's counsel before, I chose
14 those words intentionally, sort of following the claim
15 language, and Mr. Schiksnis is giving his impression of
16 what, in this hypothetical scenario, would that be
17 interacting with the user in the foreground from the
18 perspective of a person of ordinary skill, like
19 Mr. Sharkey.

03:14PM

20 THE COURT: Where would you say the basis is to
21 consider him a person of ordinary skill?

03:15PM

22 MR. DAVIS: Sure, Your Honor. I'll be able to
23 provide you citations in a moment. I know I took down
24 in my notes. I asked him his educational background; he
25 said electrical engineering. We established that he's a

03:15PM

1 senior director of engineering at Samsung. He's worked
2 there for ten years and that he was an engineer at
3 Motorola, an electrical engineer before that.

4 THE COURT: All right.

03:16PM

5 MR. DAVIS: Would you like me to provide
6 citations to the background? I don't think there is a
7 dispute about that, but it's all sort of early on in the
8 deposition, his background.

03:16PM

9 THE COURT: Was there an objection at the time
10 to asking the witness for an opinion as opposed to
11 something that he would have personal knowledge of?

03:17PM

12 MR. DAVIS: The -- so Samsung's counsel raised,
13 in the testimony that we talked about with the
14 hypothetical, the first question that they raised
15 "objection, form"; and after that I sort of reiterate
16 the question, and Samsung's counsel objects, "Form,
17 scope, legal conclusion."

18 THE COURT: It's clearly calling for an
19 opinion.

03:17PM

20 MR. DAVIS: I think, Your Honor, it's not
21 calling for an opinion any more than lots of testimony
22 from Mr. Sharkey.

23 THE COURT: You know, you yourself said it was
24 a hypothetical question.

03:17PM

25 MR. DAVIS: Yes. I mean, I'm giving him an

1 example of if a user's watching a video.

2 THE COURT: That's an opinion.

3 MR. DAVIS: I would submit no more so than any
4 other question, or plenty of other questions to
03:18PM 5 Mr. Sharkey. It seems very difficult to distinguish
6 those, Your Honor. These are third-party technical
7 witnesses. Neither is an admitted expert. It seems
8 like those would rise and fall together.

9 THE COURT: And they might. I didn't have that
03:18PM 10 objection before.

11 Well, I will overrule the objection to the
12 passage on Page 84 to 85 about [REDACTED]
13 [REDACTED]. I think there is sufficient relevance of that.

14 I will sustain the objection to the question at
03:18PM 15 Page 91 to 92 on the grounds that it's calling for the
16 witness's opinion about the claim limitation. It's not
17 asking about the functionality of the device.

18 What else?

19 MR. DAVIS: I believe, Your Honor, that takes
03:19PM 20 us to Mr. Yamasani's deposition designations. There, I
21 think there is a mix. This is -- we have an objection
22 to one of Defendants' designations and then they have
23 some objections to some of our designations.

24 With respect to our objection, this is
03:19PM 25 Page 212, Lines 19 through 25 of Mr. Yamasani's

1 testimony, and the issue here is I think not totally
2 unlike what you were just discussing, Your Honor, that
3 Defendants are using the claim term "intercepting" in
4 their questioning of Mr. Yamasani.

03:20PM

5 He's testifying on behalf of Google. That's a
6 financially interested third party. So this is
7 Defendants questioning their own financially interested
8 witness. That's kind of the distinction I would draw,
9 Your Honor, between what I was just talking about with

03:20PM

10 Mr. Schiksnis and so, you know, we would say this is
11 improperly eliciting a legal conclusion from a biased
12 fact witness.

03:20PM

13 And so I can appreciate, Your Honor, if the
14 thought as well, didn't you just take the opposite
15 position in the last one. And, Your Honor, I think how
16 I'm distinguishing it, Your Honor, is that it's the
17 state of the parties and the counsel.

03:21PM

18 I was questioning Mr. Schiksnis, who is a
19 financially interested witness, Samsung, and he's giving
20 testimony. I'm not eliciting such testimony from my own
21 witness.

22 THE COURT: You don't have to explain yourself.

23 MR. DAVIS: No, I appreciate it, Your Honor.

03:21PM

24 THE COURT: So the objection to the question of
25 the witness at Line 19 is based on it calling for an

1 opinion?

2 MR. DAVIS: That's right, Your Honor.

3 THE COURT: All right.

4 MR. DAVIS: It would probably make sense for me

03:22PM

5 to cede the floor to Defendants to address this one and

6 then you can stay up and address yours.

7 THE COURT: All right.

8 MR. SIM: So thank you, Your Honor. On the

9 point Mr. Davis was just discussing, I'll just make a

03:22PM

10 few quick points.

11 THE COURT: And it would help me out if you

12 tell me what is the designated part? Where does the

13 designation begin and end?

14 MR. SIM: Your Honor, excuse me just one moment

03:22PM

15 while I grab it.

16 THE COURT: All right.

17 MR. SIM: So the designation in question here,

18 at least I understand the extent of Plaintiff's

19 objections to it, is just going to be Lines 19 through

03:23PM

20 25 on Page 212.

21 THE COURT: That's the part that's objected to.

22 What part is being offered? Is it just that question

23 and answer?

24 MR. SIM: Give me one moment, Your Honor.

03:23PM

25 THE COURT: I'm just trying to get the context.

1 MR. SIM: For Verizon's affirmative
2 designations, it actually precedes several pages before
3 this, omitting objections and other attorneys speaking.
4 So it includes, for instance, subject matter throughout
03:24PM 5 Page 212, 211, and 210, which Defendants would submit
6 sort of lead up to the point that Plaintiff's counsel
7 highlighted, which is in a sense a summation of the line
8 of questioning.

9 THE COURT: All right. So give me what you
03:24PM 10 consider the relevance of this question.

11 MR. SIM: This question in fact goes to a
12 centrally relevant issue in this case as is laid out in
13 relatively great detail in the parties' briefing on the
14 '541 patent motion for summary judgment.

03:25PM 15 As Your Honor's certainly aware, intercepting
16 is a key claim element in the two remaining asserted
17 claims from that patent and testimony from Google's
18 representative here, Mr. Yamasani, going to whether or
19 not some of the accused products that perform
03:25PM 20 intercepting or related verbs is, thus, directly
21 relevant to that noninfringement position.

22 THE COURT: And has the witness at some point
23 here indicated that he's using "intercepting" and
24 "cancelling" the same way, interchangeably, or is he
03:25PM 25 trying to contrast those?

1 MR. SIM: If you'll give me one minute, Your
2 Honor. There was no instance in which the witness
3 equated those terms as synonymous in the course of his
4 testimony.

03:26PM

5 THE COURT: So what we're talking about, I
6 guess, is the question and why does the question say
7 "intercepting or cancelling."

03:26PM

8 MR. SIM: Perhaps it was just a clumsily worded
9 question. But the purpose of this line of questioning
10 was to arrive at a point where, you know, there was --
11 the witness was explaining that there was certain API
12 transactions, as he was calling them, that occur in the
13 course of the accused products and that those are
14 received at certain -- without delving too deeply into
15 the disputed issues surrounding the '541 patent motion
16 for summary judgment, that those API transactions are
17 received by certain components.

03:26PM

18 And the question, questioning leading up to the
19 objected question was establishing that there is no
20 instance in which an API transaction does not, in fact,
21 reach where it's going.

03:27PM

22 THE COURT: So this relates to the issue of
23 whether something can be intercepted and still be
24 received?

03:27PM

25 MR. SIM: Correct. It certainly touches on

1 that issue, Your Honor.

2 THE COURT: All right.

3 MR. SIM: I should clarify, Your Honor, if
4 you'll permit me, that while this does go to that legal
03:27PM 5 issue which is in the summary judgment brief and the
6 parties have submitted, this questioning is just on the
7 operation of the accused product. So it does not touch
8 the legal issue of what the definition of "intercepting"
9 is. It's whether, from the witness's perspective, a
03:27PM 10 witness who has not seen the patents, believes that, you
11 know, how the products operate could be described or not
12 described as intercepting.

13 THE COURT: All right. Thank you, Mr. Sim.

14 MR. SIM: Your Honor, Defendants also have
03:28PM 15 objections to Plaintiff's designations from this
16 deposition transcript. Would it be helpful for you to
17 hear from Mr. Davis next, or should I remain up here and
18 address that second set of designations?

19 THE COURT: Why don't you identify for me the
03:28PM 20 issue.

21 MR. SIM: Certainly. So this is -- this will
22 sound familiar to Your Honor. This is the same
23 objection I discussed a moment ago with respect to
24 Mr. Sharkey's testimony. And understanding that -- Your
03:28PM 25 Honor's finding on that issue, this is a similar issue

1 where a third-party witness, again a Google witness, was
2 shown a patent on which that witness was an inventor and
3 was asked questions as to that patent. And I'm happy,
4 if it's helpful for the Court, to read into the record
5 the exact portions on which Defendants object, but the
6 thrust is the same.

7 This is that there was a chance for confusion
8 here and that the relevance of this patent is even lower
9 in the sense that it was filed in 2016, so long after
10 all the patents we've been discussing in this case.

11 And once I've read into the record, I'll direct
12 the Court's attention to a specific portion of the
13 testimony here where terms having to do with the accused
14 features and, in fact, the asserted patents are
15 intermingled in with some questioning on this entirely
16 unrelated patent upon which Mr. Yamasani happens to be
17 an inventor.

18 THE COURT: All right. Where does this occur?

19 MR. SIM: So I'll skip to the end. The point
20 which I just referenced begins at 135 in Mr. Yamasani's
21 transcript at Line 17, begins with a discussion of doze
22 mode, an accused feature in this case.

23 And then on 136 beginning at Line 4, all of a
24 sudden in that same line of questioning, we're back to
25 discussing Mr. Yamasani's prior art patent, which -- or,

1 I'm sorry, not prior patent. Entirely unrelated patent.
2 Excuse me, Your Honor.

3 And for reference, this was introduced as
4 Exhibit 7 to Mr. Yamasani's deposition on Page 126 of
03:30PM 5 this transcript.

6 THE COURT: And the part that you find
7 objectionable is what starts at Line 17 on Page 135?

8 MR. SIM: That is correct. So at this point in
9 the questioning, Mr. Yamasani's patent has been
03:30PM 10 introduced as Exhibit 7, and he's been asked some
11 questions on it. Then when this designation begins at
12 135, Line 17, there are a couple questions about the
13 accused features.

14 Then you'll see "Let me ask you this," starting
03:31PM 15 on Page 136 at Line 4: If you go to Column 7, Line 31,
16 for example -- and then the questioning attorney reads
17 in a sentence from Mr. Yamasani's patent and begins
18 asking him about the meaning of the word "inactive" in
19 his patent.

03:31PM 20 Now, if the Court goes back to Page 135, there
21 is some discussion about the accused features and that
22 they may trigger when a device has or has not been
23 active or inactive for some period of time.

24 So we submit that there is prejudice here in
03:31PM 25 the sense, or at least the possibility of jury confusion

1 in a sense that this entire -- this patent from 2016
2 that is unrelated to the issues in this case is suddenly
3 being used to somehow define or discuss the context of
4 the accused features.

03:31PM

5 THE COURT: And the issue of an inactive state
6 is presented in this case; is that it?

7 MR. SIM: Yes, Your Honor, to the extent that
8 doze mode, and which is referenced slightly further down
9 on Page 135, application standby, are accused features.

03:32PM

10 And the times at which they become active play into some
11 of Headwater's infringement theories.

12 I think I'm happy to discuss that in great
13 detail, but it becomes quite complex after that point.

14 THE COURT: All right. Thank you, Mr. Sim.

03:32PM

15 Let me hear the response.

16 MR. SIM: Thank you, Your Honor.

17 MR. DAVIS: So, Your Honor, I think the issue
18 here is essentially the same thing that we dealt with
19 with Mr. Sharkey's patent, so I think our points would
20 be the same there.

03:32PM

21 The only thing I would add, Your Honor, is the
22 designation, the 135, Line 17, the designation that
23 begins with 135:17, I think at least the portion running
24 from 135:17 to 23 is not tied to Mr. Yamasani's patent
25 and so I don't think this objection really is applicable

03:33PM

1 here, to that portion at least.

2 The subsequent portion we see at Line 24,
3 Headwater's counsel asks: And app standby considers
4 whether an application has been active or inactive for
03:33PM 5 some period of time as well?

6 And that point, the witness says: Well, what
7 do you mean by active?

8 And then Headwater's counsel goes back into
9 Mr. Yamasani's patent, where he uses the term "inactive"
03:33PM 10 to provide context of, you know, "Well, what did you
11 mean by inactive when you wrote that in the patent."

12 So I think that first portion running from
13 Lines 17 to 23 on Page 135 is just -- that should not be
14 objectionable.

03:34PM 15 THE COURT: That's not talking about
16 Mr. Yamasani's patent?

17 MR. DAVIS: It is not. That is a question --
18 my understanding is that's just a standalone question.

19 The next question, Headwater's question asks
03:34PM 20 about app standby and whether an application is
21 considered active or inactive, and at that point the
22 witness, you know, asks about the -- you know, what do
23 you mean, and we dive back into the patent.

24 But I think Mr. Sim said that as well, that
03:34PM 25 this first portion is not specifically about

1 Mr. Yamasani's patent.

2 THE COURT: All right.

3 MR. DAVIS: So otherwise, I think just the
4 points we made earlier about Mr. Sharkey's own patent as
03:35PM 5 well and sort of providing context for terminology.

6 THE COURT: Mr. Davis, why isn't the
7 questioning on Page 212 just talking about the
8 functioning of the product, the Android system?

9 MR. DAVIS: I mean, I do think he is talking
03:35PM 10 about Android. He does say that. He refers to
11 connectivity manager. I think it's just a matter of he
12 is talking about it in the context of claim language and
13 so we think it's sufficiently comparable to the other
14 types of testimony along those lines that use
03:36PM 15 terminology that come from claims.

16 THE COURT: I think that the question at
17 Page 212 is sufficiently tied to the function of the
18 system as opposed to the claim language particularly, so
19 I'll overrule the objection to Page 212, also overrule
03:36PM 20 the objection to Page 135. I don't think that will be
21 confusing to the jury. I think it's fair
22 cross-examination of the witness.

23 MR. DAVIS: Thank Your Honor.

24 MR. SIM: Thank Your Honor.

03:36PM 25 THE COURT: What's next?

1 MR. DAVIS: So at this point, Your Honor, we
2 have two more witnesses left. The one of those
3 witnesses is Mr. Russell. I think what I mentioned
4 earlier and what we suggested to Defendants is that
03:37PM 5 Mr. Russell, some of his designations are tied up in
6 issues that the parties have resolved with respect to
7 MILs and the like. We can argue those at this point. I
8 don't know if Defendants have a different thought on how
9 to address that.

03:37PM 10 Oh, I can clarify. I think what I'm hearing
11 from Defendant counsel is that they had thought we were
12 going to table these designations. That's what we
13 proposed, Your Honor. That's fine from our perspective.
14 I didn't know if we had agreement on that. If we do,
03:37PM 15 that's fine.

16 MR. KREVITT: Your Honor, may I be heard?

17 THE COURT: Yes, Mr. Krevitt. Go ahead.

18 MR. KREVITT: Your Honor, we're fine tabling
19 those particular designations, but this goes to an issue
03:38PM 20 that I raised this morning we want to address at the
21 Court's convenience, which, you'll recall Motion in
22 Limine Number 4 was to exclude Russell testimony for a
23 variety of reasons. This was dealing with whistleblower
24 allegations, and it related entirely and explicitly to
03:38PM 25 the '042 patent.

1 With the '042 patent out of the case now, Your
2 Honor, there's no conceivable relevance to any of
3 Russell's testimony. This is the issue, as I say, that
4 I flagged earlier today, the issue about which the Court
5 had extensive discussion with Mr. Chang, who explicitly
6 and entirely tied it to the '042 patent.

7 And Your Honor will recall that when Your Honor
8 denied the motion in limine, at least in part, Your
9 Honor said that you had been satisfied that there was a
10 connection to the '042 patent.

11 So as I said, that's the issue that we want to
12 discuss with Your Honor, which we could do now, we could
13 do later, we can do in writing with respect to
14 revisiting MIL Number 4, Russell, in light of Your
15 Honor's summary judgment ruling with respect to the '042
16 patent.

17 THE COURT: All right. And I am fine with
18 taking that up now or whenever. We have a variety of
19 issues yet to finish.

20 I see that I've got a day Wednesday, the 18th.
21 So that's the Wednesday before trial. It's set aside
22 now for a hearing in the Headwater/Samsung case, the 641
23 case, and I could use that day, or some part of it, as
24 the final event in this case if we have things that we
25 don't finish.

1 Does that make sense?

2 MS. FAIR: We're obviously available to be here
3 for that.

4 THE COURT: Okay.

03:40PM

5 MR. KREVITT: Yes, Your Honor, the same for
6 Defendants.

7 THE COURT: All right.

03:40PM

8 MR. KREVITT: It may be that there are certain
9 issues that could benefit with some additional
10 discussion, some of the designations, for example, and
11 the parties can continue to work on those.

12 THE COURT: Well, I don't mind leaving Russell
13 and you until later if we have a date set for that. So
14 that's what I'm understanding the parties want to do?

03:41PM

15 MR. KREVITT: That's fine as to the
16 designations, Your Honor. The issue I have is
17 different. So if Your Honor would indulge, it is a
18 different issue. It goes to a more threshold
19 fundamental question and in some sense is just a
20 revisiting of Motion in Limine Number 4.

03:41PM

21 THE COURT: What you're doing is saying that
22 now that there is at least a recommendation that the
23 '042 not remain in the case that that would change the
24 outcome of MIL 4 with respect to other testimony by
25 Mr. Russell?

03:41PM

1 MR. KREVITT: That's correct, Your Honor. And
2 I can, if you'd like, briefly explain why and then can
3 address any questions Your Honor may have.

4 THE COURT: All right.

03:41PM

5 MR. KREVITT: So again -- and I don't want to
6 plow old ground. Your Honor had extensive discussion on
7 MIL 4 a week ago, but this is the motion in limine that
8 Defendants filed with respect to a Mr. Russell. He was
9 somebody who had allegations that Verizon had copied a

03:42PM

10 PowerPoint. And Mr. Fenster, in connection with a
11 different motion, the sanctions motion we argued, made
12 clear that the Russell -- the relevance of the Russell
13 testimony was to this April 2010 PowerPoint presentation
14 and that the relevance of that was limited entirely to
15 the '042 patent.

03:42PM

16 We then did argument on the Russell motion in
17 limine, and Mr. Rosenthal, my partner, tried to convince
18 Your Honor that there was no connection with that
19 PowerPoint and that testimony to the '042 patent. But
20 that was the sole discussion, whether the PowerPoint on
21 which -- regarding which Mr. Russell had testified, that
22 2010 April PowerPoint had any relevance to any issues in
23 this case. We argued that it didn't because it wasn't
24 tied to the '042 patent.

03:42PM

03:43PM

25 Mr. Chang, on behalf of Headwater, stood here

1 and argued to Your Honor that there was a connection to
2 the '042 patent.

3 And Your Honor may recall he walked you through
4 paragraphs starting at Paragraph 90 and then into the
03:43PM 5 hundreds, I think concluding at about 116, and marched,
6 Your Honor, through every paragraph and connected -- or
7 endeavored to, and ultimately did so to Your Honor's
8 satisfaction, connected that to the '042 patent.

9 The Paragraph 90, the first paragraph to which
03:43PM 10 Mr. Chang referred, the paragraph on which the analysis
11 was entirely based was -- this is in Mr. Cooklev's
12 report -- was tying this information and Russell
13 testimony to the '042 patent.

14 Dr. Cooklev was an expert only on the '042
03:44PM 15 patent, and that was the only testimony, of course, that
16 Mr. Chang cited because that's the only relevance.

17 Your Honor ultimately, after argument,
18 concluded that looking at that document, which was the
19 Dr. Cooklev expert report, 185-3, Your Honor ruled,
03:44PM 20 quote: I am satisfied that it shows that there is an
21 expert who is connecting the presentation at issue and
22 Mr. Russell's testimony with the technology in the '042
23 patent.

24 We obviously, we had tried to persuade Your
03:44PM 25 Honor otherwise, but Your Honor was satisfied that

1 Dr. Cooklev had sufficiently tied it to the '042 patent.

2 With the '042 patent out of the case, Your

3 Honor, there is no conceivable relevance for

4 Mr. Russell's testimony. It is salacious. Your Honor

03:44PM

5 has already found that there is no allegation of copying

6 as to Verizon. The allegations with respect to the '042

7 patent, what the testimony related to was things that

8 happened on Verizon's network.

9 The '541 and '613 patent have nothing

03:45PM

10 whatsoever to do with anything on Verizon's network.

11 It's all features on the phones. And that presentation

12 summer of 2010 was years before the '541 patent came

13 out, years before the '613, before there was even a

14 marking page that was even alleged to be relevant to

03:45PM

15 either of those two patents.

16 So, Your Honor, given that the entire basis for

17 arguing against our motion in limine as to Mr. Russell

18 was the '042 patent, and the '042 patent being out of

19 the case now, we would respectfully submit that there's

03:45PM

20 no conceivable relevance or basis for that testimony to

21 be admitted.

22 And finally, Your Honor, it's highly

23 prejudicial. It's salacious testimony that it was in

24 connection with the whistleblower litigation, as Your

03:46PM

25 Honor is aware, that was settled. It dealt with

1 allegations of copying, which aren't in the case, and
2 dealt with allegations of copying on technology that has
3 no relevance, of even alleged relevance, to any of the
4 patents in this case.

03:46PM

5 And so for all of those reasons, Your Honor, as
6 I said, we would request that Your Honor grant MIL
7 Number 4 with respect to Mr. Russell's testimony.

8 THE COURT: All right.

9 MR. KREVITT: Thank you, Your Honor.

03:46PM

10 THE COURT: Thank you, Mr. Krevitt.

11 MR. DAVIS: Your Honor, just right off the bat,
12 I want to dispel what we just heard from Mr. Krevitt
13 that Mr. Chang's presentation focused entirely on the
14 '042 patent, that he did not suggest in any way that
15 there was something beyond the '042 patent that was
16 relevant to these allegations about Verizon and
17 Mr. Russell.

03:47PM

18 This is from the PTC transcript. This will be
19 Page 154, Lines 7 through 15. Mr. Chang is addressing
20 exactly this issue. And what he says here beginning at
21 Line 13, he says: "That is the infringing, the accused
22 infringing technology for the '042 patent, as well as
23 the '541 patent and the dependent claim of the '613
24 patent."

03:47PM

03:47PM

25 That's -- we explicitly said that, and I can

1 show Your Honor some portions from the -- just change
2 out my laptop.

3 I can direct Your Honor to portions of
4 Dr. Wesel's testimony. In this case, his expert report
03:48PM 5 here, Your Honor, paragraph 4, you'll see at the bottom
6 of this slide. Dr. Wesel is saying: "Based on the
7 events discussed above, the similarities between the
8 ItsOn DAS system (which practiced the '541 patent) and
9 Verizon's DAS system. That's the subject of what we're
03:48PM 10 talking about with Mr. Russell (which infringes the '541
11 patent, see e.g., '541 Claim 1[e]), it is my opinion
12 that Verizon would have been aware of, or at least
13 willfully blinded itself to, the '541 patent in the 2016
14 time frame, which I understand was when Verizon defined
03:48PM 15 its LTE PCO requirements."

16 There is a particular claim element, Your
17 Honor -- apologies. I have slides I can hand up
18 actually, if I may.

19 The Slide 3 that I'm referring to, the excerpt
03:49PM 20 I just read from Dr. Wesel's Appendix A to his opening
21 report, that's filed on the docket at Docket 176-7. The
22 '541 Claim 1[e] element that's being referenced here is
23 a limitation that says "or based on information from a
24 network element," that's what we point to as PCO being
03:49PM 25 an example of how that network element limitation is

1 infringed. That is explicitly what Dr. Wesel, the
2 infringement expert who did not opine on the '042
3 patent. He opined on the '541 and '613 patent. He
4 links PC0 and the Verizon DAS system that is relevant to
03:50PM 5 Mr. Russell to the '541 patent.

6 And so I think to that point, Your Honor, I
7 think we would fundamentally disagree with Defendants'
8 suggestion that the -- everything related to Mr. Russell
9 and everything related to MIL 4 falls away by virtue of
03:50PM 10 the '042 noninfringement report and recommendation.

11 THE COURT: All right. Thank you, Mr. Davis.

12 MR. KREVITT: Very briefly, Your Honor.

13 First, the testimony that was put on the page
14 just now that purports to be testimony was, in fact,
03:51PM 15 questions put to Mr. Russell by counsel. None of that
16 is his actual testimony.

17 But more importantly, the portions of the Wesel
18 report that you just saw that were taken as snippets,
19 what Mr. Davis did not point out is that what Mr. Wesel
03:51PM 20 did -- and we can show Your Honor if it's helpful; at a
21 break we'll hand up the report -- is he reproduced,
22 literally reproduced out of Dr. Cooklev's report. He
23 said Dr. Cooklev made all these allegations; Dr. Cooklev
24 did all of this analysis. That's why Mr. Chang talked
03:51PM 25 about Dr. Cooklev and only Dr. Cooklev.

1 Then Mr. Wesel said at the end, and this had
2 some relevance to the '514 -- excuse me -- '541 patent
3 too. That's why we spent an hour or so on the
4 Mr. Russell MIL 4 when we were here last, Your Honor,
5 because Your Honor asked where does an expert tie this
6 document, this testimony, to a patent.

7 Mr. Wesel never does that, Your Honor. We
8 don't think Dr. Cooklev did it, but at least he made
9 some effort to. He supplied paragraphs relating to it.
10 There is no conceivable allegation, Your Honor, none
11 that the reference that had to do with how Verizon's
12 network would work relates to the '514 patent in which
13 all of the accused features are on the phones.

14 Dr. Wesel doesn't say anything beyond this
15 conclusory *ipse dixit* sentence after reproducing
16 literally, wholesale, Dr. Cooklev's opinion. There is
17 nothing in this record, Your Honor, that ties
18 Mr. Russell's testimony to any other patent in this
19 case. It would be brought into this case purely for its
20 salacious, its prejudicial, its atmospheric effect.
21 There is no connection to the presentation to
22 Mr. Russell's testimony and to the patents that remain
23 in this case.

24 And in fact, Your Honor, as I said,
25 Mr. Russell's testimony related to something that

1 happened in 2010 that would be on the network. The
2 patents issued in this case years later.

3 We heard that this might be relevant to
4 willfulness for the other patents. We have a summary
03:53PM 5 judgment motion. Obviously Your Honor is aware.
6 Willfulness requires identification of patents. There
7 is no identification of patents in Mr. Russell's
8 testimony or that document. The patents wouldn't issue
9 for years.

03:53PM 10 Mr. Davis said it relates to copying. There's
11 no allegation of copying as to Verizon. Your Honor has
12 already ruled that out in connection with Motion in
13 Limine Number 2.

14 So the only possible relevance, or purpose --
03:54PM 15 excuse me -- of this testimony that is untethered
16 substantively to any patent is to bring somebody, some
17 testimony in that says, "Hey, Verizon got some
18 presentations, Verizon looked at the presentations and
19 then Verizon did some things." It's totally unfair and
03:54PM 20 untethered to any patent.

21 And that's why finally, Your Honor -- and I
22 know counsel sits at the podium and tells you all the
23 evidence is this way and someone else tells you all the
24 evidence is this way, and it's hard for anybody to sort
03:54PM 25 that out. And this is what makes this so unfair.

1 We are in this situation where Mr. Chang
2 defended this motion in limine entirely on the '042
3 because that's its only possible relevance. And now we
4 show up today, in light of the '042 out, and Mr. Davis
03:54PM 5 shows you a snippet of an expert report in which
6 Dr. Wesel said, oh, by the way, the '541 also.

7 So for all those reasons, Your Honor,
8 Mr. Russell's testimony has no relevance. It's not tied
9 to any expert, and no expert has tied it substantively
03:55PM 10 to any patent in this case.

11 THE COURT: All right.

12 MR. KREVITT: Thank Your Honor.

13 THE COURT: Mr. Krevitt, I will look further at
14 that issue.

03:55PM 15 MR. KREVITT: Thank Your Honor.

16 THE COURT: Mr. Davis, if you want to address
17 the issue that you've referred to a couple times about
18 financial interest of a Google witness, I know it was
19 last time, and the related issues, I'll take those up.

03:56PM 20 MR. DAVIS: Thank Your Honor.

21 THE COURT: I guess the first thing I wanted to
22 know is that one of the most important issues last time
23 was the fact that everyone agreed there was
24 indemnification involved in that case, which is
03:56PM 25 something that is not going to be made known to the jury

1 for various reasons.

2 Also, everyone agreed that the witness from
3 Google -- I think it was Mr. Hanson -- was one of the
4 primary technical witnesses who would be testifying for
03:57PM 5 the Defendant. He had no knowledge of the
6 indemnification issue. In any event, we didn't want
7 that coming out in front of a jury.

8 Are those basic facts present in this case with
9 respect to a witness?

03:57PM 10 MR. DAVIS: Yes, I believe so, Your Honor. The
11 lead technical witnesses in these cases, especially now
12 that the two remaining patents if '042 doesn't go
13 forward, is those are primarily device-side patents. Of
14 course, I just talked with you about an order from a
03:57PM 15 network element piece of the '541 claim.

16 But the Defendants have pointed to the
17 witnesses from Apple and from Google as providing the
18 relevant testimony on the accused functionality, which
19 operates on the Android operating system or the iOS
03:58PM 20 operating system.

21 The witness lists that Defendants have
22 submitted is extensive. It includes numerous witnesses
23 from Apple and witnesses from Google as well. I think
24 that they certainly intend to rely upon them. And much
03:58PM 25 like in the 103 case, they intend to rely upon, I think,

1 witnesses to support their prior art case as well. They
2 have made end noninfringing alternatives. I'll add as
3 well, Your Honor, they have noninfringing alternatives
4 related to Apple functionality. So I do think we have
5 that same issue of these are important technical
6 witnesses. I think the parties agree on that point.

7 On the indemnification issue, we do have -- we
8 know that the Defendants have purchase and sale
9 agreements with their OEM suppliers, and those purchase
10 agreements, at least what we've seen, include
11 indemnification provisions.

12 It's possible that we don't have perfect and
13 complete information for everyone, but that's certainly
14 our view of it, and we've tried to obtain that
15 information. Much like in the Samsung case, to the
16 extent we haven't gotten the information or a complete
17 picture of the information, it's not for lack of trying
18 and that's something that Defendants should be providing
19 to us much like we finally eventually got at the
20 pretrial conference in the 103 case.

21 So, Your Honor, really all we're asking for is
22 essentially the same treatment as before, that if we're
23 going to have these witnesses come from a party, or a
24 third party that has a financial interest in this case,
25 that we just introduce them as such.

1 I have the language that Judge Gilstrap used
2 before Mr. Hanson testified, and he introduced him as
3 Mr. Hanson being a Google employee, that Google -- and
4 clarifying that Google has a financial interest in this
04:00PM 5 case through its relationship with Samsung. No mention
6 of indemnification, as Your Honor pointed out.

7 THE COURT: And who are the third parties whose
8 employees will be testifying that you believe fall into
9 this category?

04:00PM 10 MR. DAVIS: Yes. So certainly Google and
11 Apple. So that would be from Google, they have
12 Mr. Yamasani. Mr. Sharkey is a former Google employee.
13 He now is no longer employed by Google.

14 On the Apple side, they have Mr. Chan, they
04:01PM 15 have Mr. Venkatraman, and they have a prior art witness
16 as well from Apple, Mr. Begeman. I believe that's
17 B-e-g-e-m-a-n.

18 And on the Samsung side, Defendants can correct
19 me if I'm wrong, but I don't believe they have
04:01PM 20 identified Samsung witnesses as potential live
21 witnesses. We would need to do an introduction before.
22 So as long as that's the case, then I believe it would
23 be those Apple and Google witnesses.

24 THE COURT: And which of those entities are you
04:01PM 25 contending have indemnification agreements with Verizon?

1 MR. DAVIS: We believe Apple, Google, and
2 Samsung as well, but it sounds like Samsung may not be
3 an issue if Samsung witnesses are not being relied upon
4 by Defendants.

04:02PM

5 THE COURT: All right.

6 MR. DAVIS: If they are, then we would include
7 Samsung as well, of course.

8 THE COURT: And with respect to Apple, you
9 mentioned Chan, and then who was the second one?

04:02PM

10 MR. DAVIS: Yes, the second one is
11 Mr. Venkatraman, and that's V-e-n-k-a-t-r-a-m-a-n.

12 THE COURT: And a Mr. Begeman?

13 MR. DAVIS: Yes. I believe it's Begeman,
14 B-e-g-e-m-a-n.

04:02PM

15 THE COURT: All right.

16 MR. DAVIS: And he was a -- focused on the
17 prior art, Apple prior art that Defendants have
18 identified.

19 THE COURT: All right. Let me hear from
20 Verizon.

04:03PM

21 MR. DACUS: Thank Your Honor. Deron Dacus on
22 behalf of Verizon.

23 As the Court well knows, Your Honor, the Court
24 upstairs is very strict on announcements related to
25 video depositions and what can be said before that video

04:03PM

1 deposition. From our perspective, as of today, we don't
2 think that the Court should deviate from that practice.
3 But having said that, I want to say one additional thing
4 to the Court.

04:03PM

5 We've really not had a chance to confer with
6 the other side on this issue. This is not something
7 we've had a chance to even talk to our clients about and
8 so we would ask for that opportunity to do that.

04:04PM

9 I will say at first blush and just facially, we
10 do have some pretty significant concern about the judge
11 saying to the jury, you know, that the witness has a
12 financial interest in the case.

04:04PM

13 Certainly in the Samsung case, apparently they
14 had certain agreements that led that to be the most
15 expeditious and efficient way to handle that. I'm not
16 sure we're similarly positioned; but given that it looks
17 like we're going to have an additional pretrial in the
18 days preceding this, we would ask the Court to defer
19 this and allow us an opportunity to confer with the
20 other side about it.

04:04PM

21 THE COURT: All right. Well, I'm fine with
22 that. I will tell you that to the extent that you call
23 witnesses whose employers have indemnification
24 agreements with the Defendant, I think that the jury
25 needs to be informed of that because they are otherwise

04:05PM

1 not going to know that the witness they are listening to
2 is not just a disinterested witness.

3 MR. DACUS: I've stood at this podium and made
4 that argument, too, Your Honor, many times. So I
04:05PM 5 understand exactly what the Court is saying. I will
6 say -- this will be no surprise to, Your Honor, I'm
7 sure -- indemnification is not always a black-and-white
8 issue.

9 THE COURT: I know.

04:05PM 10 MR. DACUS: And that's certainly -- almost
11 certainly the case here. And so that's part of, I
12 think, the meet-and-conferring that needs to go on. And
13 I certainly recognize and acknowledge that a witness who
14 has financial interest and/or bias, that's fair game in
04:06PM 15 some respects.

16 THE COURT: And there are a variety of ways to
17 communicate it. And the Court shares your concern that
18 it not be overemphasized, but I think, you know, there
19 needs to be a way to do it. And it's not going to be
04:06PM 20 repeated over and over, I can tell you that. But in any
21 event, hopefully there won't be that many different
22 witnesses that it will apply to.

23 I'm happy to pass that until the next time
24 we're here, with the understanding that if we don't hear
04:06PM 25 anything better, it's going to happen very similarly to

1 the way it happened in the last case.

2 MR. DACUS: Understand all that, Your Honor,
3 and appreciate the Court giving us a little time on this
4 issue.

04:06PM 5 THE COURT: All right. That is not a problem.
6 We'll get back to this then on the next hearing.

7 MR. DACUS: Thank Your Honor.

8 THE COURT: Thank you, Mr. Dacus.

9 MR. HOFFMAN: Your Honor, can we return for
04:07PM 10 just a moment to the other objections to Verizon
11 witnesses that we addressed a little earlier in the
12 hearing?

13 THE COURT: Has someone refreshed their
14 recollection?

04:07PM 15 MR. HOFFMAN: They have. Someone has refreshed
16 their recollection.

17 So maybe most importantly, I want to clarify
18 the record because I misremembered things a little bit.
19 It was the case that we had objections for untimely
04:07PM 20 disclosed Verizon witnesses. I think the way -- I
21 misremembered how that would possibly resolve.

22 Looking at the pretrial hearing from last week
23 at Page 28, counsel for Defendant represented -- or
24 Verizon represented that, if possible, that they
04:07PM 25 wouldn't be calling the particular witnesses, the five

1 witnesses at issue, which would resolve the issue.

2 We haven't heard back from the last week and
3 tried to do -- anyway, we haven't heard back on those
4 witnesses and whether, in fact, the issue is resolved
04:08PM 5 and so it remains, as far as we know, a live issue until
6 we hear different.

7 THE COURT: All right. Is there anyone on
8 behalf of Verizon who is currently able to speak to that
9 issue?

04:08PM 10 MR. VINCENT: Your Honor, I think the answer to
11 that is we don't yet have an answer because the witness
12 lineup will be somewhat dependent on the rulings that
13 Your Honor will issue on the various motions and so to
14 finalize that to be able to answer the question and
04:08PM 15 resolve the issue I think depends on the resolution of
16 those.

17 So we would propose working together to give
18 some time and, at that additional hearing date, to be
19 able to have an answer at that point.

04:08PM 20 THE COURT: I'm not sure exactly what the
21 nondisclosure issue is, but if the situation is that the
22 names of these witnesses were not disclosed to the
23 Plaintiff during the discovery period, it's likely that
24 they would be excluded. If it's a different issue, then
04:09PM 25 it could be a different situation.

1 MR. VINCENT: My understanding, it's a
2 different issue, Your Honor.

3 THE COURT: Well, is there any objection to
4 just passing this until the next hearing?

04:09PM

5 MR. HOFFMAN: No, Your Honor. We would request
6 that we receive an answer to the question prior to the
7 hearing so that we know if that's an issue.

8 MR. VINCENT: That's not a problem, Your Honor.

9 THE COURT: All right. Thank you.

04:09PM

10 There's also an issue that we have not resolved
11 about Plaintiff's Exhibit 26, the email, and --

12 MR. ROBB: Your Honor, I would ask the --

13 THE COURT: Mr. Robb, if you want to be heard,
14 please come up.

04:10PM

15 MR. ROBB: Thank you, Your Honor.

16 We received the proper email about two hours
17 ago, so that's now resolved.

18 THE COURT: All right. Obviously I continue to
19 feel that we're not likely to get to the T-Mobile case
04:10PM 20 on this trial setting, but we have time now. If the
21 counsel want to switch to issues that are solely
22 T-Mobile issues, we can take those up, or not.

23 MR. HOFFMAN: At least from Plaintiff's point
24 of view, we would like to address those if possible,
04:11PM 25 Your Honor.

1 MR. KREVITT: Your Honor, we're happy to -- at
2 the risk of being a broken record, we would also like a
3 short period of time just to tee up some of the issues
4 that remain in summary judgment and Daubert. I think we
5 can do that without full argument. There's just a few
6 issues that we thought might be helpful to direct your
7 attention to.

04:11PM

8 THE COURT: All right. Are these matters that
9 are also addressed in your current briefing?

04:11PM

10 MR. KREVITT: Oh, yes, Your Honor.

11 THE COURT: Okay.

12 MR. KREVITT: Excuse me. But they could
13 benefit from some explanation. Yes, Your Honor, they
14 are.

04:11PM

15 THE COURT: So you want to read them with
16 emphasis?

17 MR. KREVITT: That's actually almost precisely
18 what I'd like to do, Your Honor. May I?

19 THE COURT: I will give you the next few
20 minutes.

04:12PM

21 MR. KREVITT: Okay. How many, Your Honor?

22 THE COURT: A few.

23 MR. KREVITT: A few. Okay.

24 Your Honor, one of the items that I had
25 mentioned that we -- and all kidding aside, this is

04:12PM

1 addressed in the briefing, but it did seem that it would
2 be helpful, given that it's a claim construction issue,
3 just to address it briefly with Your Honor. It's the
4 '541 patent.

04:12PM

5 There is an independent claim, Claim 1, for
6 which we have noninfringement arguments. Those are set
7 out fully in the briefing. I don't intend to raise
8 those with Your Honor unless, of course, Your Honor has
9 any questions. And then there is Claim 79. That is

04:12PM

10 a -- and Claim 83. Those are depending issues.

11 The issue in those claims, particularly with
12 respect to Claim 79, is intercepting, interception.

13 There really seems to be very little dispute that the
14 API message that has to be intercepted is, in fact, not
15 intercepted in the accused products. It gets where it's
16 supposed to go.

04:13PM

17 And the noninfringe -- excuse me. The
18 infringement read, the position that the Plaintiff has
19 taken is that interception actually includes reception,
20 that interception and reception are the same;

04:13PM

21 specifically, that receiving and responding constitutes
22 interception. And the sole basis for that -- there's no
23 argument that that's the plain and ordinary meaning.

24 The sole basis for that is statements that Defendants in
25 the IPR took that position and that an expert -- AT&T's

04:13PM

1 expert, not T-Mobile, not Verizon -- AT&T's expert took
2 that position and so, therefore Your Honor should adopt
3 that position. And it seemed worth just addressing that
4 briefly.

04:14PM

5 Even if the Defendants had taken that position,
6 it obviously would not amount to judicial estoppel. We
7 lost the IPR. But more importantly, Your Honor, and
8 this is really the point I wanted to rise and make
9 clear: Nothing that the Plaintiffs say happened at the

04:14PM

10 IPR actually happened, meaning the experts in the IPR
11 never took the position that reception is the same as
12 interception, or interception can be satisfied when
13 something actually arrives where it was intended to go.

04:14PM

14 That's why there are statements in the briefing
15 over and over again in the text from the Plaintiffs that
16 say Defendants took this position that interception can
17 include receiving and responding. And then they will
18 quote from the IPRs.

04:15PM

19 But what Your Honor will notice when looking at
20 the IPRs is that those statements don't say that. At no
21 time in the IPR did Defendants ever take the position
22 that interception means anything other than what we all
23 know it means, which is to not get to the intended
24 recipient.

04:15PM

25 THE COURT: Is the argument against that that

1 interception can include something that does end up
2 being received if it is also obtained by an unintended
3 third party on the way?

04:15PM 4 MR. KREVITT: No, Your Honor. That isn't --
5 there is some ambiguity in the briefing as to whether it
6 has to ultimately get where it's intended. That's not
7 actually the issue. The issue is whether the message
8 gets intercepted first, even if it ultimately winds up
9 where it was ultimately intended to go. I hope that
04:16PM 10 answers Your Honor's question.

11 There's two ways to think about interception.
12 One is it never gets where it was supposed to go, and
13 another is that it gets stopped, there's -- it
14 intervened with before it arrives at the recipient that
04:16PM 15 it was originally intended.

16 Our view, we're not looking for a narrow
17 definition of interception at all. The Plaintiffs, at
18 Page 10 of their brief, set out two definitions of
19 interception. The first is based on this supposed
04:16PM 20 statements in the IPR that did not happen. That is
21 receiving and responding to an API request constitutes
22 interception. This is at Page 10 of -- and maybe,
23 Mr. Sim, if we could pull up just that page. And you
24 will see that there are two definitions given. That's
04:16PM 25 the first.

1 You see here, Your Honor, number 1. This is
2 from the Plaintiff's opposition brief, and they say the
3 Court should confirm that "intercepting" an API request
4 or application message includes the full scope of the
04:17PM 5 term, including, one, receiving and responding to an API
6 request consistent with Defendants' own admitted
7 understanding of the term and supported by the testimony
8 of numerous POSITAs, including Defendants' experts; and,
9 two, receiving or observing a message intended for
04:17PM 10 another as confirmed by general purpose dictionaries.

11 The first, this notion of receiving and
12 responding, which is, I think it is fair to say,
13 literally the opposite of interception. The only basis
14 they have in their briefing is supposed statements by
04:17PM 15 Defendants in the IPR and AT&T's expert.

16 I should note with respect to AT&T's expert, he
17 explici- -- of course, it shouldn't count against us in
18 this case and it's not sufficient to change the plain
19 and ordinary meaning of the term, but I should note that
04:18PM 20 he explicitly said in his report that he understands
21 this is how the Plaintiff is interpreting the term. And
22 applying that definition, he then applied that
23 definition to certain prior art.

24 Nobody on the Defendants' side, any defendant
04:18PM 25 side, has ever taken the position that "interception"

1 means anything than what we all know "interception"
2 means.

3 The reference that was being discussed in the
4 IPR, the Rao reference, was -- used "interception"
04:18PM 5 exactly the way "interception" is used everywhere else.

6 So the reason I wanted to stand, Your Honor, is
7 two things. One, once "interception" gets its plain and
8 ordinary meaning, there is no infringement of Claims 79
9 and 83 and that's why they have come up with a
04:19PM 10 definition where reception equals interception.

11 And two, because they repeated it again in the
12 sur-reply, I wanted to make clear to the Court, and I'm
13 happy to walk through every single one of the statements
14 from the IPR. Not one of them actually says that
04:19PM 15 "interception" means anything other than not being
16 received by the intended recipient. Every single one of
17 the statements is consistent that -- sorry. I'm just
18 reading a note while trying to talk to you. Every
19 single one of those statements is consistent with the
04:19PM 20 plain and ordinary meaning of "interception."

21 I also would note, Your Honor, that when
22 Dr. Raleigh was deposed, he said that the word
23 "interception" in the patent should have its plain and
24 ordinary meaning. So that's why, Your Honor, we thought
04:19PM 25 it might be helpful to address this briefly because the

1 only basis that is articulated in the briefs is what
2 Defendants supposedly said, and they said no such thing;
3 and at a minimum, it's not sufficient for disavowal.
4 It's not a lexicographer; it's not judicial estoppel.
04:20PM 5 It can't change the plain and ordinary meaning of the
6 term.

7 The only other thing to which they point is
8 that their expert now says it and, of course, that's not
9 sufficient to change the meaning of a term, an expert
04:20PM 10 just saying it. You need either intrinsic evidence, of
11 which there is none, or extrinsic evidence. Some
12 dictionary, some technical paper, some anything that has
13 ever used the word "interception" in the way they are
14 using it now. There is nothing. The sole basis is
04:20PM 15 these alleged statements by Defendants which don't say
16 it and would be insufficient in any event.

17 THE COURT: All right.

18 MR. KREVITT: Thank you, Your Honor.

19 THE COURT: Thank you, Mr. Krevitt.

04:21PM 20 MS. FAIR: Good afternoon, Your Honor.

21 THE COURT: Good afternoon.

22 MS. FAIR: I am not about to argue about
23 noninfringement, as the Court can probably guess. We
24 had asked them for an identification in terms of what
04:21PM 25 they wanted to address in terms of substantive motions

1 before the last pretrial conference and this was not on
2 that list, so we don't have the right person here to
3 address that.

04:21PM

4 My request would be if, within two days of
5 getting the transcript of what Mr. Krevitt just argued,
6 if we could have leave, if we think there's something
7 more that needs to be addressed for a two-page response
8 to the argument we just heard. I'm just concerned
9 because we --

04:21PM

10 THE COURT: I think that all of this is in the
11 briefs. I really do.

12 MS. FAIR: Okay.

13 THE COURT: I guarantee you I will request a
14 supplement if I determine it's not.

04:21PM

15 MS. FAIR: Thank you, Your Honor. We're not
16 interested in writing any more than we need to. I just
17 felt --

18 THE COURT: Okay.

04:21PM

19 MS. FAIR: -- like we needed to make sure we
20 could be heard on what Mr. Krevitt just said if it
21 wasn't already addressed.

22 THE COURT: All right. Certainly.

04:22PM

23 Let me ask both sides. Is either side aware of
24 something that is in the Headwater/T-Mobile pretrial
25 order that we didn't address initially? In other words,

1 something to do with the protocol or the issues that are
2 laid out that we need to address? Otherwise, I can move
3 on to, I know there's some slight differences in the
4 MILs, and maybe we can take those up. Is there anything
5 in the pretrial order that we need to address?

04:22PM 6 MR. VINCENT: I believe from Defendants'
7 perspective, we don't believe there's anything unique to
8 T-Mobile in the pretrial order that wasn't resolved, or
9 similar issues in the Verizon pretrial order. I don't
10 know if Plaintiffs have a different view.

04:23PM 11 MR. DAVIS: Same view for Plaintiff, Your
12 Honor.

13 THE COURT: All right. Well, then let me turn
14 to the MILs and ask first. I can't recall. I know I
04:23PM 15 looked and there wasn't much difference in the
16 Plaintiff's MILs regarding the two cases, but there may
17 be.

18 MR. HOFFMAN: Your Honor, the only difference
19 is that in regard to Headwater's MIL 4, that was
04:23PM 20 resolved by agreement between Verizon and Headwater.

21 And then we had hoped to continue to talk and
22 reach some agreement as to T-Mobile. We have not and so
23 Headwater's MIL 4 in the T-Mobile case is still at
24 issue, Your Honor.

04:23PM 25 THE COURT: All right. And is the difference

1 that T-Mobile did not make any investments as Verizon
2 may have?

3 MR. VINCENT: I'll speak to that.

4 So I think T-Mobile did not make investments in
04:24PM 5 Headwater. T-Mobile paid ItsOn for different ItsOn
6 products, software. And so we have it on MIL 4 that is
7 on that issue particularly for similar reasons.

8 And also the Verizon investments because
9 Headwater has said that they intend to introduce the
04:24PM 10 Verizon investments in the T-Mobile case; and from our
11 perspective, again, that's doubly prejudicial. If they
12 are not coming in in Verizon, for the reasons we've
13 said, they are not tied to patents, they are not tied to
14 the asserted patents. They began before the asserted
04:24PM 15 patents were even filed. They are certainly not -- they
16 are certainly prejudicial for T-Mobile such that if they
17 come in in T-Mobile, all of the things that Verizon said
18 would have to happen.

19 In other words, we would have to call -- have a
04:25PM 20 mini trial calling Verizon witnesses explaining that
21 these invest- -- Verizon investments are irrelevant to
22 the asserted patents, and we just don't think that's
23 necessary in the T-Mobile trial, just as it was not
24 necessary in the Verizon trial.

04:25PM 25 THE COURT: I guess the Plaintiff's MIL 4 is

1 not really about that. That just ended up being part of
2 the compromise?

3 MR. HOFFMAN: Yes, Your Honor.

4 MR. VINCENT: I'm sorry. That goes to

04:25PM

5 T-Mobile's MIL 4, yes.

6 THE COURT: Okay. I guess at this point, if
7 there's an -- if Plaintiff's MIL 4 in the T-Mobile case
8 has not been resolved, then let's resolve it.

9 MR. HOFFMAN: Your Honor, I have a couple of

04:26PM

10 slides, if you wouldn't -- if I could approach.

11 THE COURT: All right.

12 MR. HOFFMAN: Your Honor, this is a pretty
13 straightforward issue. You've already ruled three times
14 at least that in particular, the 2018 Series B offer to
15 Verizon is not relevant, that it's not evidence that --
16 it's not evidence of the value of the company, and even
17 if it was, the value of the company is not relevant to
18 the determination of damages.

04:26PM

19 However, both -- however, T-Mobile in DX127
20 seeks to enter into evidence that 2018 offer. Its
21 expert, Ms. Stamm, relies on that 2018 offer in exactly
22 the way Your Honor found was inappropriate. She uses it
23 to opine on the value of the company and to say that
24 that is essentially a cap on damages.

04:27PM

04:27PM

25 In their briefing, Defendants claim that

1 Mrs. Stamm does not actually rely on it, in sort of a
2 strange way. She's relying on InterDigital. And they
3 say, well, she's relying on InterDigital, which is in
4 2020; but because this offer was made in 2018 and we can
5 make up a valuation from that offer, we get to push the
6 InterDigital number back two years, from 2020 to 2018.
7 They say, therefore, she's not relying on it.

8 I don't really understand that. She is relying
9 on it, and if it's not relevant -- if the determination
10 of -- if the valuation is not relevant, then it's not
11 relevant. And merely saying that it's sort of a backup
12 to InterDigital doesn't change the fact about that.

13 Your Honor, there's nothing inconsistent
14 with -- the other point they raised in their opposition
15 is that they say it's inconsistent that we want to
16 introduce the fact of the investment without talking
17 about or offering as an investment without talking about
18 the particular numbers and, Your Honor, we don't see
19 that it's inconsistent.

20 Dr. de la Iglesia, our validity expert,
21 addresses some of the investment information, some of
22 the investment evidence. He addresses it as evidence of
23 industry praise and commercial success. He doesn't --
24 for that, he doesn't rely on the numbers. And, Your
25 Honor, it's not really any different than, for example,

1 Your Honor's ruling about the Qualcomm and Fortress
2 offers where Your Honor in previous cases has allowed
3 the Defendants to introduce those as to the fact of the
4 offer but has ordered that the amount be redacted
04:29PM 5 because it, just as an offer, is not in itself evidence
6 of a reasonable royalty and would be prejudicial.

7 So that's -- all we ask is that essentially the
8 Court make the same order here as the 2018 offer as it
9 has in prior cases.

04:29PM 10 If I could have the ELM0 for a second.

11 Your Honor, there's two other documents in this
12 category. One is DX126. This is a 2009 investment
13 discussion. It's a very similar issue. Again, it's
14 talking about a potential investment and the particular
04:30PM 15 valuation related to that investment. Again, under Your
16 Honor's prior rulings, that's just not relevant and it's
17 clearly prejudicial.

18 And finally, as the DX128 from 2016, again it's
19 kind of the same thing. Here again, there's discussion
04:30PM 20 of investment and of a valuation attached to that
21 investment. We would argue that all three of these
22 exhibits fall under the same category and all three
23 should be excluded.

24 THE COURT: All right.

04:31PM 25 MS. DOMINGUEZ: Hello again, Judge Payne. So a

1 couple of things here. I think this MIL, as Mr. Hoffman
2 just showed, is broader than just the 2018 Series B, so
3 I want to talk more broadly about what the MIL is
4 requesting.

04:31PM

5 What the MIL is really requesting is that
6 Plaintiff have it both ways. They get to talk about the
7 investments to bolster the patents. So they get to
8 introduce facts about Verizon investing to bolster in
9 terms of, he mentioned Mr. de la Iglesia on

04:31PM

10 nonobviousness to bolster on damages. That's in their
11 damages expert report. But they don't want Defendants
12 to be able to introduce context.

04:32PM

13 Now, as Mr. Robb will discuss with respect to
14 T-Mobile's MILs, we don't think anything about Verizon's
15 investments should be coming into the T-Mobile case at
16 all. So that's our position, and you'll hear from
17 Mr. Robb on that. But to the extent that anything about
18 Verizon's investments comes in, then we should certainly
19 be able to put those in context.

04:32PM

20 So, for example, Mr. Sim, if you could please
21 pull up T-Mobile's DTX128, please.

04:32PM

22 So if Your Honor can read that other, or we
23 could zoom in a little bit. But what Defendant's
24 Exhibit 128 shows is how Verizon viewed the reasons for
25 investing. And, for instance, it says -- and this is

1 not a *post hoc* justification by Verizon now as to what
2 the investment was about. This is in June of 2016, at
3 the time it was making its largest investment, what did
4 it view the technology -- what did it view as the
5 technology it was investing in.

04:33PM

6 Well, it says directly that it's for a pricing
7 and billing technology platform. That's all. It may be
8 we'll hear Plaintiff say that they had other
9 technologies and try to say that some of the

04:33PM

10 technologies they were offering were relevant to these
11 patents. But from Verizon's perspective, Verizon had no
12 knowledge of those technologies, no thought that they
13 were investing in anything related to what's now accused
14 and asserted in this case from Verizon's perspective.

04:33PM

15 It was an investment in billing and pricing technology.

16 And so, again, T-Mobile's position is none of
17 this should be coming into the T-Mobile case. The
18 Verizon investments are not relevant and are highly
19 prejudicial in the T-Mobile case. They create a

04:34PM

20 sideshow about what Verizon's investments were about.
21 But if anything is to be said about them, they should be
22 put in context, and the jury should be allowed to know
23 that Verizon certainly did not think it was investing in
24 anything about blocking background data or anything to
25 do with any aspect of the two patents that are now

04:34PM

1 asserted in this case. Verizon --

2 THE COURT: How would the offers by Headwater
3 or equity shares provide context for the investment?

4 MS. DOMINGUEZ: Sure. So I think Your Honor's
04:34PM 5 asking about the 2018 Series B letter.

6 So, Mr. Sim, if we could pull up T-Mobile
7 DTX127, please. Okay. And if we could scroll down to
8 the pre-money valuation. There we go.

9 Okay. So what this provides context for is
04:35PM 10 when Headwater was seeking investments, how was it
11 positioning its own company. I know Your Honor has seen
12 this document and so I don't want to say more than is
13 necessary if Your Honor's already well familiar.

14 But what happened here is that a group of
04:35PM 15 investors including Dr. Raleigh, his cofounder, and
16 Sippl Investments made an offer in suggested terms for a
17 Series B round to the other investors. And what they
18 said at that time as they were positioning this outreach
19 to other investors and trying to get other investors to
04:35PM 20 sign onto a Series B, they said: We, the cofounders and
21 Sippl, are viewing the company at a pre-money valuation
22 as being [REDACTED], and based on that, here's what we
23 are proposing as the terms of this investment.

24 Now, that puts in context how the cofounders
04:36PM 25 and major investor were viewing the company at that

1 point in time and what that outreach, how they were
2 framing those offers to other investors.

3 Ms. Stamm -- and this is all addressed in the
4 Daubert briefing on the Stamm Daubert. Ms. Stamm also
04:36PM 5 uses it in a way that is fully consistent with Your
6 Honor's prior rulings. She does not use it to say
7 [REDACTED] is the valuation of the patent. She does
8 not use it to establish a royalty in this case.

9 What she uses it for, and she explained this in
04:36PM 10 her deposition -- and that's Exhibit G to T-Mobile's
11 opposition to this MIL -- at Page 74, Lines 8 through
12 19, Ms. Stamm explained she is properly, and as the
13 Court has already allowed, using a different set of
14 information related to InterDigital to help support her
04:37PM 15 damages opinion.

16 But it is pertinent as a check to know --
17 because that transaction that Your Honor has already
18 allowed in was in 2020. It is pertinent to know that
19 two years earlier, so closer in time to the hypothetical
04:37PM 20 negotiation, the cofounders and major investor in
21 Headwater were not viewing the value of the company as
22 higher, right?

23 So she uses it as a check that her number,
24 which she gets from other sources, is accurate and that
04:37PM 25 the number wouldn't have been higher at an earlier point

1 in time. So I think it's relevant both just to
2 contextualize -- and, again, we don't think Verizon's
3 investment should be coming into the T-Mobile case at
4 all. But if anything is said about them, it does
04:38PM 5 contextualize how the cofounders and the major investor
6 in Headwater were viewing the company, how Headwater was
7 framing its investment outreach to other investors. And
8 then Ms. Stamm also uses it in the appropriate way that
9 she explained at her deposition.

04:38PM 10 THE COURT: And show me one more time the slide
11 you started with about the Verizon investment?

12 MS. DOMINGUEZ: Oh, sure. And that was -- I
13 didn't have slides, but I do have the exhibit itself.
14 So that's one example. There's an -- there's the

04:38PM 15 example I showed is T-Mobile's DTX128. That was -- and
16 we can -- Mr. Sim is pulling that up if you'll just give
17 us just a minute.

18 So this is a letter, internal in Verizon dated
19 June 23rd, 2016, and it is signed -- if you could scroll
04:39PM 20 down just a little bit further, Mr. Sim -- by

21 individuals who were at Verizon Ventures who were
22 analyzing this investment, and it's their view on what
23 the investment was for. So they say, the "Re" line is
24 Verizon Venture Investment, ItsOn. And they say: We
04:39PM 25 have reviewed Verizon Venture's proposal to make an

1 investment in ItsOn. And they say that ItsOn is a
2 company that has developed a pricing and billing
3 technology platform for emerging wireless technologies
4 such as 5G, and then it goes on. So it's saying exactly
5 what Verizon thought it was investing in.

6 So to the extent that the Plaintiff is going to
7 try and use Verizon's investments to bolster the patents
8 in this case, this letter shows, as far as Verizon was
9 concerned, its investment had nothing to do with the
10 patents in this case, with any of the technologies that
11 are accused in this case, with anything to do with
12 background data or blocking data at all. They viewed it
13 as a investment into a pricing and billing technology
14 platform.

15 And there's one more exhibit, if Your Honor
16 would like to see it, that similarly puts in context the
17 2009 investment if Your Honor has questions about that.
18 But these documents would be to contextualize the
19 Verizon investments if those investments were to come
20 into the T-Mobile case at all.

21 THE COURT: All right. Thank you,
22 Ms. Dominguez.

23 MR. HOFFMAN: Your Honor, very quickly.

24 In terms of the argument about context, counsel
25 showed very clearly that there's no need to present to

1 the jury the valuation terms in these documents in order
2 to make the point. We do not seek to exclude all
3 evidence of the investments. We seek only to exclude
4 the, in particular, the valuations that have been, and
5 most importantly the 2018 one, being used for an
6 improper purpose, but the valuations in the earlier ones
7 as well.

8 We just looked at a document where counsel
9 pointed out that there was context for that, for at
10 least the context they want to focus on for those
11 investments. The document can be redacted to remove the
12 financial terms and still provide all of that context.

13 In fact, none of the documents you showed were
14 the financial terms really relevant to any of the
15 context. The only reason to present the financial terms
16 is to misuse the valuations therein.

17 In terms of whether it's relevant that Verizon
18 made an investment in ItsOn and Headwater, there aren't
19 that many carriers. Verizon is a major competitor of
20 T-Mobile. It's a major force in the industry. It's
21 hard to think of a better example of industry
22 recognition than an investment by one of T-Mobile's
23 competitors.

24 THE COURT: What do you have that indicates
25 that the investment was in any way based on the asserted

1 patents and their technology?

2 MR. HOFFMAN: What we have, Your Honor, is --
3 this is only one of the documents that were exchanged.
4 There is a series of communications and presentations
04:42PM 5 provided to Verizon. In those presentations and
6 information provided to Verizon, there is information
7 about the patents or both the -- before they were issued
8 in terms of the technology that was covered by the
9 patents and after they were issued.

04:42PM 10 So these are only some of the documents of that
11 ongoing conversation between Verizon and T-Mobile. But
12 the -- in terms of the -- the valuation terms are not
13 necessary to that argument between experts or even
14 between the parties about the relevance of these
04:43PM 15 documents. The jury can make that determination without
16 being exposed to these numbers.

17 And finally, Your Honor, calling something a
18 check is not a "get out of jail free" card. Clearly
19 it's being used, the valuation of 2018 is being used as
04:43PM 20 evidence of the value of the patent and supporting
21 reasonable royalty. And so it's not -- calling it a
22 check is just admitting that in fact it is being used
23 for an improper purpose, and it's not a check because
24 it's not just being used to say, well, this is a similar
04:43PM 25 number. It's actually literally being used to pull the

1 2020 number from the 2018, pull it back two years
2 earlier to say that same valuation, the same improper
3 valu- -- the use of the valuation that applied in 2018
4 actually applies in -- sorry, in 2020, actually applies
5 in 2018 as well.

04:44PM

6 THE COURT: All right. Mr. Hoffman, are there
7 other differences between the Plaintiff's MILs in
8 Verizon and in T-Mobile other than this MIL 4?

9 MR. HOFFMAN: There are, Your Honor. Those are
10 Defendants' MILs.

04:44PM

11 THE COURT: Right. But as far as the
12 Plaintiff's MILs go?

13 MR. HOFFMAN: No other differences as
14 Plaintiff's MILs.

04:44PM

15 THE COURT: All right. Thank you. I will look
16 further at the difference and get out an order on
17 Plaintiff's MIL 4 in the T-Mobile case.

18 MS. DOMINGUEZ: Your Honor, if I could just
19 very briefly respond to two of the items that came up in
20 your discussion with Mr. Hoffman just now.

04:44PM

21 THE COURT: All right.

22 MS. DOMINGUEZ: Okay. So the actual investment
23 amounts, the amounts that Verizon actually did invest,
24 we agree those can and should be redacted. Again, we
25 think none of this should come in at all, but those

04:45PM

1 numbers can and should be redacted.

2 As to the [REDACTED] number that's in the
3 Series B, the 2018, that number can't be redacted
4 because Ms. Stamm actually uses that as a check in her
04:45PM 5 analysis. Again, it's not the basis of any number she
6 derives. She doesn't use it to determine damages. But
7 what she uses it as is the cofounders and major investor
8 saying we did this work. We valued the company and our
9 pre-money valuation is [REDACTED].

04:45PM 10 Just briefly, Your Honor correctly noted that
11 for industry recognition, there must be nexus to the
12 patents, and here there is nothing, zero, tying any of
13 these investments to the asserted patents.

14 THE COURT: All right.

04:45PM 15 MS. DOMINGUEZ: Thank you.

16 THE COURT: Thank you.

17 Which of the Defendants' MILs in T-Mobile is
18 different than in Verizon?

19 MR. VINCENT: Let me focus on T-Mobile's MILs
04:46PM 20 Number 3 and 4.

21 THE COURT: All right.

22 MR. VINCENT: Thank Your Honor.

23 So T-Mobile MIL 3 is focused on Samsung's
24 roaming reduction, which we've heard some about, and we
04:46PM 25 have several of their motions on this issue. We have

1 noninfringement. We have -- sorry -- a motion to strike
2 Dr. Wesel's opinions on Samsung's roaming reduction as
3 not timely disclosed as an accused product. We have
4 summary judgment motions on copying. And some of the
04:46PM 5 issues that are intertwined with these motions, just to
6 repeat the point that Ms. Dominguez just made and that
7 I've made earlier today and you heard last week is the
8 point about nexus. And I'll just repeat this point
9 briefly before getting into the specific T-Mobile,
04:47PM 10 really the aspects of Samsung's roaming reduction.

11 We all agree, everyone agrees that there must
12 be, for secondary considerations, copying, all of this
13 must be a nexus to the asserted claims. And when the
14 dispute crystalized last week is that Headwater's
04:47PM 15 counsel got up and said there doesn't have to be an
16 element-by-element analysis that these ItsOn products
17 practice the claims, all right? We have not said that
18 there needs to be a claim chart.

19 And I believe Headwater's counsel got up and
04:47PM 20 cited a case that they had not cited in their briefing,
21 and that case is *WBIP versus Kohler*. That's 829 F.3d --
22 I'm sorry; I think that's 1317. If that's not right,
23 I'll correct that.

24 But Headwater's counsel cited that case with a
04:48PM 25 proposition that you don't have to cite -- you don't

1 have to tie a nexus to all the elements; you just have
2 to tie in one element, and that's flatly wrong. That's
3 not the law. The law is, in fact, the opposite.

4 The WPI -- sorry, WBIP case, in that case there
04:48PM 5 was a presumption of nexus because the Plaintiff did
6 tie -- did have evidence explaining that a product
7 embodied the patent and that necessarily required an
8 expert analysis proving that a product embodied the
9 patent. And in that case, then the evidence of

04:48PM 10 secondary considerations was allowed to be admitted.

11 There is no such presumption here because
12 Headwater has not had -- doesn't have any evidence
13 whatsoever that any of the ItsOn products practice the
14 asserted claims.

04:49PM 15 What the Federal Circuit has said in the
16 absence of that presumption is this, and this is *In Re:*
17 *Kao*, and it says 639 F.3d 1057, Federal Circuit. Where
18 the offered secondary consideration actually results
19 from something other than what is both claimed and novel
04:49PM 20 in the claim, there is no nexus to the merits of the
21 claimed invention, meaning that there must be a nexus to
22 some aspect of the claim not already in the prior art.
23 And that case cites other cases for this same
24 proposition.

04:49PM 25 The point, what is the point? The point is

1 this, the point that I made earlier: Is that for there
2 to be a nexus, there has to be something, some evidence
3 tying this evidence of secondary considerations to what
4 is novel about the patent, novel about the claims. Not
04:50PM 5 any element. That's what Headwater's counsel said. Any
6 element, background, for example. No.

7 Background is in Claim 1 of the '541, which was
8 disclaimed. To the extent there can be any novelty, it
9 has to be tied to the asserted claims that are not
04:50PM 10 disclaimed, which involve intercepting an API message.
11 And you will not see a single mention of that claim
12 element in any of the evidence that Headwater's expert
13 uses to establish nexus. Now, that's the overlapping, I
14 guess, legal principle. There is no nexus.

04:50PM 15 Even if the Court were to deny all of our
16 motions, okay, Dr. Wesel's -- our motion to strike
17 Dr. Wesel's infringement analysis on roaming reduction
18 and our motion, for summary judgment motion on copying,
19 even if the Court were to deny those motions, Headwater
04:51PM 20 should still not be allowed to discuss roaming reduction
21 in this case and that's because of the nature and timing
22 of the evidence that it uses to rely, to bolster, to
23 support this claim.

24 What's Headwater's story? Headwater's story
04:51PM 25 that it wants to tell is this. It wants to say that

1 ItsOn was so great, it gave -- it made this product for
2 Sprint called roaming reduction. No problems. Any bugs
3 were just minor. But Sprint and Samsung colluded to
4 terminate the Sprint contract and have Samsung copy
04:51PM 5 ItsOn's product. That's the story they want to tell,
6 right?

7 The evidence on which they rely to do that is
8 not only prejudicial, was never timely identified in any
9 disclosure in this case. Let me talk to the first point
04:51PM 10 about the termination of the Sprint/ItsOn agreement.

11 Can I have the ELM0, please?

12 This is the master services agreement on which
13 Sprint terminated the ItsOn contract, and you see that
14 it's got two termination provisions: A termination for
04:52PM 15 convenience and a termination for cause. And Sprint,
16 when terminating the agreement, invoked the termination
17 for convenience clause.

18 What Headwater wants to do -- and we know this
19 because they tried to do it; they tried to do it in the
04:52PM 20 Samsung case -- is to have their witnesses testify that
21 because Sprint terminated the agreement under the
22 termination for convenience clause, that means, as a
23 legal matter, that there was no problems with the ItsOn
24 software. That if there were problems with the ItsOn
04:52PM 25 software, then they would have terminated for cause.

1 Again, no witness in this case is qualified to
2 make opinions about the legal import of the termination
3 provision, the legal clause under which Sprint
4 terminated the contract. So no witness, lay or expert,
04:53PM 5 should be making -- should be invoking the particular
6 clause of the contract by which Sprint terminated the
7 agreement in order to make insinuations about the
8 reasons for which Sprint terminated.

9 There's simply no basis for that. There's no
04:53PM 10 expertise. There's no evidence to support that, but we
11 know that's what they will try to do is invoke this
12 clause and make a legal argument without qualifications.
13 That's the Sprint side of it.

14 Next they want to turn to the [REDACTED]
04:53PM 15 [REDACTED]
16 [REDACTED]. And I want to
17 point out, again, whether or not we should-- we believe
18 that should not be in the case at all.

19 But what is uniquely problematic here is that
04:54PM 20 Headwater and the evidence on which it relies was never
21 once identified in any disclosure in this case. So take
22 Dr. Wesel's infringement analysis. There are
23 infringement contentions. We have interrogatories that
24 go to infringement. We have interrogatories that go to
04:54PM 25 copying.

1 Asking Headwater to identify the bases for its
2 contentions, identify the evidence on which it relies,
3 and this point -- I can't underscore it-- is undisputed.
4 They did not cite a single one of these documents or a
5 single one of the witnesses on which they rely.

6 They rely on depositions of Samsung employees
7 taken in the Samsung case for the patent at issue in
8 that Samsung case. We were not involved in that case.
9 We had no notice of those depositions. We did not have
10 a chance to participate in those depositions.

11 Dr. Wesel, for example, cites Mr. Dan Durig,
12 again, a Samsung employee deposed in the Samsung case.
13 He cites the deposition of Mr. Kim. He cites that
14 deposition 119 times in his analysis of roaming
15 reduction, to explain how roaming reduction worked.

16 Headwater never identified Mr. Durig, never
17 identified Mr. Kim in any of their Rule 26 disclosures,
18 in any interrogatory response, never identified this
19 evidence as relevant to any issue in this case. You
20 won't find it. It won't be disclosed. You can look,
21 and it'll -- the evidence will not be identified in any
22 disclosure, interrogatory response, et cetera.

23 And I want to point Your Honor's attention
24 to -- that's Dr. Wesel. I want to show Your Honor
25 Dr. -- or, sorry, Mr. de la Iglesia's report.

1 THE COURT: Mr. Vincent, how is this a motion
2 in limine?

3 MR. VINCENT: Because the evidence -- and among
4 the evidence is hearsay. Because it was evidence taken
04:56PM 5 by a nonbias -- by a third party, which we did not
6 participate in, had no ability to ask these witnesses
7 questions and, given the timing of the disclosure, have
8 no -- now no remedy.

9 We have no ability to go ask Samsung these
04:56PM 10 questions about how this product supposedly worked. We
11 have no ability to ask Samsung's engineers questions
12 about whether or not it meets the limitations of the
13 claims in this case versus the claims at issue in the
14 Samsung case. The first time they ever mentioned
04:56PM 15 Mr. Durig's name or ever mentioned Mr. Kim's name or
16 ever identified these documents as relevant to any issue
17 is in their expert reports.

18 Mr. de la Iglesia, the entire basis, the entire
19 basis of Mr. de la Iglesia's argument about Samsung,
04:57PM 20 about the copying is based on an email that was not
21 produced to Defendants until after the expert reports
22 were served and deposition testimony by Mr. Durig that
23 Headwater did -- sorry, that Headwater took in the
24 Samsung case that Defendants did not have a chance to
04:57PM 25 participate in or respond to.

1 I can show Your Honor, if I could have the
2 ELMO.

3 And this is just a portion of Mr. de la
4 Iglesia's report. This is about secondary
04:57PM 5 considerations. I believe this is about specifically
6 copying, but he cites similar testimony for most of
7 these secondary considerations. And what does he cite?
8 You see he cites to the Samsung third-party 36477. That
9 was not given to us until Headwater served its opening
04:58PM 10 reports. And then he cites the testimony of Mr. Durig.
11 And again, this is why it's a MIL issue, Your Honor,
12 because of the nature of the allegations.

13 What does Mr. de la Iglesia say here? What
14 does he -- what is his opinion? His opinion is that

04:58PM 15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED].

19 And again, the only evidence he cites is an
04:58PM 20 email that was not produced in this case until after
21 Plaintiffs served their opening reports, at least by
22 according to the Bates number, and deposition testimony.
23 Again, they never cited any of that testimony, any of
24 those documents.

04:58PM 25 We have an interrogatory asking them for their

1 basis for secondary considerations. You will not find
2 this in the -- identified in that. And the prejudice to
3 us is that -- the 403 basis of the MIL is that how are
4 we supposed to defend ourselves against this, this
04:59PM 5 testimony, and it was not even given in this case.

6 If they -- this is the backwards approach that
7 Headwater has taken in their MIL briefing. They said if
8 we wanted -- if we wanted this evidence, we could have
9 gotten it. Well, if they had ever disclosed this as
04:59PM 10 relevant, that would be a different question, but they
11 never did.

12 THE COURT: I will try to give this matter full
13 consideration on your briefing. I've got to tell you
14 it's hard for me to follow the issue now, and I don't
04:59PM 15 know if it's because we're seven hours into this hearing
16 or because of the nature of it, but it's not going to be
17 a successful MIL if I can't understand the point of it.
18 So I'm going to try and give it a fair reading tomorrow
19 and --

05:00PM 20 MR. VINCENT: Your Honor, appreciate that, and
21 I -- probably in the presentation had something to do
22 with it and so I apologize for that. Hopefully we can
23 remedy that at a different time, but I appreciate Your
24 Honor's consideration.

05:00PM 25 THE COURT: All right. So where we stand now,

1 I think that with respect to Verizon, other than the
2 motions that are briefed and pending -- and those, we'll
3 try and get rulings out promptly -- I think it's
4 otherwise ready to go. All it requires is for one case
5 to settle, which is a distinct possibility.

05:00PM

6 Is there something else that -- you know, we'll
7 gather back on that Wednesday before trial. If there
8 are issues that -- regarding the exhibits that have not
9 been taken care of and, for that matter, any other
10 issues that we've left open, I'll probably get an email
11 sent out asking you to file a joint notice to identify
12 what issues there are, that we need to take up at that
13 time.

05:01PM

14 Mr. Davis, is there anything else that you want
15 on the record for the Plaintiff?

05:01PM

16 MR. DAVIS: No, Your Honor. I think that makes
17 perfect sense. That, you know, a lot has transpired at
18 these two PTCs and that it would be helpful for the
19 parties to confer about, you know, what issues remain
20 and make sure we're all clear on that for the PTC.

05:01PM

21 THE COURT: And obviously we're going to need
22 more time for the T-Mobile case, and that time will be
23 provided before trial. And we'll also have a trial date
24 provided.

05:01PM

25 MR. DAVIS: Oh, can I ask one question, Your

1 Honor?

2 Is it the case that we'll return to T-Mobile
3 MILs, the remaining T-Mobile issues on the 18th if
4 there's time, or do we want to make that just dedicated
05:02PM 5 to Verizon and we'll take up T-Mobile issues at another
6 time?

7 THE COURT: I'm open to suggestion. Frankly, I
8 think that we could do that. We also have the
9 Headwater/Samsung 641 case set on that day, so we don't
05:02PM 10 have a full day to do it. But I don't know.

11 Does counsel for T-Mobile have an opinion on
12 that?

13 MR. VINCENT: Your Honor, I think we should, I
14 guess, finalize Verizon, as Your Honor said. And if we
05:02PM 15 can start the T-Mobile MILs before 4:15, probably can do
16 that. If it gets to be a point we're not going to be
17 able to give those arguments the attention they deserve,
18 we can potentially reserve another day.

19 But hopefully we can get all that done in one
05:03PM 20 day. That's aspirational, but it just depends on -- I
21 think it partly depends on how much the parties can
22 resolve between now and that date.

23 THE COURT: Well, there's currently a hearing
24 set in the Headwater/Samsung matter for that day, and am
05:03PM 25 I remembering right? Was that a hearing that related to

1 the spoliation issue?

2 MR. DAVIS: It does, Your Honor, and we -- I
3 don't know the current state, but I think we intend to
4 talk with Samsung about, you know, the ruling on the
05:03PM 5 sort of similar motion that was issued in the Verizon
6 case and the impact of that on the spoliation.

7 THE COURT: I understand that Samsung was not
8 heard in connection with the recent ruling and may have
9 a belief that they can point out things that would alter
05:04PM 10 it. But in any event, all that is by way of saying,
11 Mr. Vincent, I don't know how much time we do have. But
12 anyway, between now and then, we'll straighten out
13 whether we're going to address other issues in T-Mobile
14 as well.

05:04PM 15 MR. VINCENT: I think that we'll be prepared to
16 do so, to the extent time allows, but we'll need to make
17 sure we finalize the Verizon issues first. Those will
18 take precedent.

19 THE COURT: All right. Anything else that
05:04PM 20 counsel for either Verizon or T-Mobile wants to put on
21 the record?

22 MR. KREVITT: No, Your Honor. We thank you
23 very much for your time and consideration on all these
24 issues.

05:04PM 25 THE COURT: All right. Well, I appreciate the

1 arguments. They've been helpful. Thank you.

2 MR. DAVIS: Thank Your Honor.

3 (Proceedings adjourned at 5:04 p.m.)

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2
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